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## Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action Under the TCPA

### Cover Page Footnote

This note is dedicated to Kristin Cassandra Lund. I would like to thank Professor Tracy E. Higgins for her invaluable guidance, and Professor Howard M. Erichson for sparking my interest in jurisdictional questions.

## NOTES

### STATUTORY INTERPRETATION OF FEDERAL JURISDICTIONAL STATUTES: JURISDICTION OF THE PRIVATE RIGHT OF ACTION UNDER THE TCPA

Fabian D. Gonell\*

#### INTRODUCTION

[Courts'] use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.<sup>1</sup>

From 1960 to 1995, the caseload of the federal district courts more than tripled.<sup>2</sup> Over the same period, the caseloads of federal appellate courts increased by approximately a factor of thirteen.<sup>3</sup> This expanding caseload has led to numerous calls for reform,<sup>4</sup> including many from the judiciary itself.<sup>5</sup> Most of the proposals call for a shifting of cases from federal to state courts, particularly cases not involving significant national interests.<sup>6</sup>

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1. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

2. See Judicial Conference of the United States, Long Range Plan for the Federal Courts 15 tbl.3 (1995).

3. *Id.* at 15 tbl.4.

4. See, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 Va. L. Rev. 1769 (1992) (calling for a complete reexamination of federal jurisdiction); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. Va. L. Rev. 171 (1995) (proposing the creation of a new system of "national courts" staffed by state judges for interstate cases); Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 Wm. & Mary L. Rev. 535 (1996) (calling for a vastly expanded and specialized federal court system).

5. For various proposals written by members of the judiciary, see Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187 (1993); Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. Rev. 1905 (1993); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 *Miss. C. L. Rev.* 211 (1994) [hereinafter Parker & Hagin, *Adapt or Lose!*]; Dolores K. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, 76 *Judicature* 90 (1992); Thomas G. Nelson, *The Future of the Federal Courts: The Case for a Mission Statement*, *Advocate* (Idaho), Aug. 1994, at 12.

6. See, e.g., Richard M. Bilby, *Letters: Not the Real World*, 74 *Judicature* 177, 228 (1991) (calling diversity jurisdiction "silly" and "an insult to state court systems" and asking "do you really want federal judges spending great amounts of precious judicial

Congress, however, is more likely to increase federal jurisdiction than to decrease it.<sup>7</sup> In 1997, 70 bills were introduced authorizing federal jurisdiction over new civil causes of action.<sup>8</sup> Only one bill contained a provision to reform jurisdiction,<sup>9</sup> and it would have prohibited plaintiffs from initiating suit in federal courts located in their home states.<sup>10</sup> Even this modest proposal did not make it into the version of the bill that was passed by the house.<sup>11</sup>

Despite these bleak statistics, 1997 was not a total loss for opponents of expanding federal jurisdiction. Two circuit courts, analyzing the private right of action created by the Telephone Consumer Protection Act<sup>12</sup> ("TCPA"), held that federal courts lacked jurisdiction over those actions.<sup>13</sup> In early 1998, another circuit adopted these decisions.<sup>14</sup> Thus, for the first time since the enactment of the general federal question jurisdiction statute,<sup>15</sup> Congress has created a federal action that cannot be brought in a federal forum.<sup>16</sup>

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time on nickel and dime narcotics cases?"); Newman, *supra* note 5, at 194 (calling for the elimination of district court jurisdiction over diversity cases and some federal question cases); Parker & Hagin, *Adapt or Lose!*, *supra* note 5, at 232-35 (proposing that all federal jurisdictional legislation be considered according to "four sets of Federal Court Fundamentals," which include, among other things, that federal courts will safeguard *significant* national interests).

7. See Symposium, *The Future of the Federal Courts*, 46 Am. U. L. Rev. 263, 270 (1996) (keynote address of Chief Justice of the Supreme Court William H. Rehnquist) ("[I]n talking about the future of the federal courts, we must understand that Congress probably will continue to enact new legislation that provides new causes of action . . . on the civil side of the docket and new federal crimes . . . on the criminal side of the docket."); Williams, *supra* note 4, at 537 ("The growth in federal litigation is certain to continue. In recent years, Congress has expanded, rather than restricted, the scope of federal laws . . ."); see also Nelson, *supra* note 5, at 12 ("[T]he thought that Congress will actually [restrict jurisdiction] is so optimistic as to be downright giddy.").

8. Search of WESTLAW, CONG-BILLTXT Database (Mar. 1, 1998) (running the following terms and connectors query: TE(("MAY BRING" "MAY BE BROUGHT") /S (SUIT ACTION) /S COURT) % TE(("ATTORNEY GENERAL" SECRETARY) +S "MAY BRING")).

9. Federal Courts Improvement Act of 1997, H.R. 2294, 105th Cong. (1997) (enacted by the House).

10. *Id.* § 302.

11. See 144 Cong. Rec. H1247-54 (daily ed. Mar. 18, 1998) (quoting the version of H.R. 2294 passed, without § 302, by the house).

12. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (1994)).

13. See *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997); *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997).

14. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998).

15. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1994)).

16. The only other federally created action over which states have exclusive jurisdiction is a claim for the resolution of mining rights under 30 U.S.C. § 30, which was passed in 1872. See Act of May 10, 1872, ch. 152, § 7, 17 Stat. 91, 93-94 (now codified at 30 U.S.C. 30 (1994)). For a discussion of this statute and the Supreme Court's

Congress passed the TCPA in 1991.<sup>17</sup> The TCPA amended the Communications Act,<sup>18</sup> and sought to protect consumers and businesses from unsolicited automated telemarketing and facsimile calls.<sup>19</sup> The TCPA provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" a private action to recover monetary damages for violations of the act, or to enjoin such violations.<sup>20</sup> A dispute has arisen over the interpretation of the statute's jurisdictional language. As noted above,<sup>21</sup> three circuit courts have ruled that the language operates to exclude federal courts from jurisdiction over suits arising under the Act.<sup>22</sup> One district court has disagreed with those circuits' readings of the TCPA,<sup>23</sup> and several district courts have implicitly assumed jurisdiction over private TCPA actions.<sup>24</sup>

This Note analyzes the controversy over the jurisdiction of private rights of action under the TCPA. Part I examines the two ways Con-

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analysis of federal jurisdiction over actions brought under it, see *infra* notes 47-56 and accompanying text.

17. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (1994)).

18. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended throughout 47 U.S.C.). The Communications Act created the Federal Communications Commission ("FCC") and preempted all state regulation of interstate communications. *Id.*

19. Telephone Consumer Protection Act, 105 Stat. at 2394-95. Congress noted that the telemarketing industry was "growing by immense proportions" and that the decrease in long-distance telephone rates and the use of emerging technologies had made telemarketing more cost-effective. S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-70. A survey had found that "about 75 percent of persons contacted favored some form of regulation of these calls, and one-half of these favored prohibiting all unsolicited calls." *Id.* at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Efforts by the states to regulate telemarketing had limited effect, because the Communications Act stripped states of the power to regulate interstate calls. *Id.*, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

20. 47 U.S.C. § 227(b)(3) (1994).

21. See *supra* notes 13-14 and accompanying text.

22. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997); *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); see also *infra* Part III (analyzing *Nicholson*, *Chair King*, and *International Science*). Two federal district courts have also found that state courts have exclusive jurisdiction over private TCPA actions. See *Murphey v. Lanier*, No. 97-CV-1784-BTM(POR), 1998 WL 154410, at \*1 (S.D. Ca. Mar. 30, 1998); *Foxhall Realty Law Offices v. Telecommunications Premium Servs., Ltd.*, 975 F. Supp. 329 (S.D.N.Y. 1997).

23. See *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 915 (S.D. Ind. 1995). This court also denied a motion to reconsider after the Fourth Circuit decided *International Science*. See *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997).

24. See *Joseph N. Main P.C. v. Electronic Data Sys. Corp.*, 168 F.R.D. 573 (N.D. Tex. 1996) (denying motion for class certification in private TCPA action); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995) (same); *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994) (dismissing TCPA claim on 12(b)(6) motion).

gress grants federal question jurisdiction. Part II explores the legislative history of the TCPA. Part III analyzes the circuit decisions which held that state courts have exclusive jurisdiction over private TCPA actions. Part IV analyzes the district court decision that rejected the Fourth Circuit's reasoning, and argues that federal jurisdiction over TCPA private actions is proper under 28 U.S.C. § 1331.<sup>25</sup> This Note concludes that jurisdictional language merely permitting state court jurisdiction, such as that in the TCPA, should not divest federal courts of § 1331 jurisdiction absent clearly expressed congressional intent to repeal

## I. THE SOURCES OF FEDERAL QUESTION JURISDICTION

Article III, Section 1 of the United States Constitution directs that the judicial power of the United States "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>26</sup> Congress's power to "ordain and establish" lower federal courts "has generally been understood to imply a power to create [such courts] vested with less than the maximum jurisdiction that the Constitution would allow."<sup>27</sup> Thus, although Article III, Section 2 of the United States Constitution provides for "federal question" jurisdiction,<sup>28</sup> the federal district courts can only

25. Section 1331 is the general federal question jurisdiction statute. *See* 28 U.S.C. § 1331 (1994). It provides for federal district court jurisdiction for all cases "arising under the Constitution, laws, or treaties of the United States." *Id.*; *see also infra* Part I.A.

26. U.S. Const. art. III, § 1.

27. Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 348 (4th ed. 1996); *see also* *Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992) (noting that "[t]he Court's cases state the rule that 'if inferior federal courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III'" (alteration in original) (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973))); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("[Congress] may give, withhold or restrict [federal district court] jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("[Congress] possess[es] the sole power of creating [inferior federal courts] and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.").

28. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. Const. art. III, § 2. Since *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Supreme Court has given this clause an expansive meaning. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.2, at 256-62 (2d ed. 1994). *Osborne* stands for the proposition that "the Constitution permits Congress to create federal court jurisdiction whenever federal law is a potential ingredient of a case." *Id.* at 258. *Osborne* continues to be good law. *See American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257-65 (1992) (upholding federal jurisdiction over actions to which a federally-chartered corporation was a party when the charter authorized the corporation to "sue and be sued" in federal court); *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-92 (1983) (upholding jurisdiction under

exercise federal question jurisdiction when it has been specifically authorized by statute.<sup>29</sup>

Congress has used two different types of statutes when granting federal question jurisdiction: general grants of jurisdiction, not tied to a specific cause of action,<sup>30</sup> and specific grants of jurisdiction over a particular cause of action.<sup>31</sup> There is often overlap between the two types of grants, with the existence of the general statute rendering a specific grant virtually superfluous.<sup>32</sup> A proper reading of a specific grant, therefore, requires an understanding of the general jurisdictional statute that provides the backdrop against which it was enacted. Thus, this part turns first to 28 U.S.C. § 1331, and then proceeds to analyze specific grants of jurisdiction.

#### A. 28 U.S.C. § 1331

Congress passed the statute that became 28 U.S.C. § 1331 on March 3, 1875.<sup>33</sup> As now codified, the law provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>34</sup> The statute had an amount in controversy requirement<sup>35</sup> until 1980, when it was re-

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the Foreign Sovereign Immunities Act of 1976, which grants federal courts the authority to hear suits by an alien against a foreign state).

29. *Bell v. New Jersey*, 461 U.S. 773, 777 (1983) (“Since federal courts are courts of limited jurisdiction, the court below could hear the case only if authorized by statute.”); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) (“Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction.”); *United States v. Hudson*, 11 U.S. 21, 22, 7 Cranch 32, 33 (1812) (noting that lower federal courts “possess no jurisdiction but what is given them by the power that creates them”).

30. *See, e.g.*, 28 U.S.C. § 1331 (1994) (granting federal district courts jurisdiction over cases “arising under” the Constitution, treaties, or federal law); 28 U.S.C. § 1338(a) (1994) (granting original jurisdiction to the federal district courts over suits “arising under” the patent laws).

31. *See, e.g.*, 7 U.S.C. § 25(c) (1994) (providing that federal district courts “shall have exclusive jurisdiction” over actions to recover damages resulting from violations of Commodities Exchange regulations); 25 U.S.C. § 3013 (1994) (providing that federal district courts “shall have jurisdiction” over actions to enforce the Native American Graves Protection and Repatriation Act); *see also infra* Part I.B.

32. Despite the general grant of federal question jurisdiction, Congress often includes a specific grant of jurisdiction in a statute creating a cause of action. For examples of such grants, *see infra* notes 68-74 and accompanying text.

33. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (current version at 28 U.S.C. § 1331 (1994)).

34. 28 U.S.C. § 1331 (1994).

35. An amount in controversy requirement is a requirement that at least the specified amount be at issue before federal jurisdiction is invoked. *See* Charles Alan Wright, *Law of Federal Courts* § 32, at 190 (5th ed. 1994). The amount is determined by the plaintiff’s good faith claim, unless it can be determined to a legal certainty that the claim is for less than the requisite amount. *See* *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). The amount was initially set at \$500. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (current version at 28 U.S.C. § 1331 (1994)). By 1980, when the amount was repealed, it was \$10,000. *See* Federal

pealed by the Federal Question Jurisdictional Amendments Act of 1980.<sup>36</sup> Other than this repeal, the federal question jurisdiction statute has remained essentially unchanged since 1875.<sup>37</sup>

Although the language of § 1331 tracks the Constitutional language granting federal courts federal question jurisdiction almost exactly,<sup>38</sup> the Supreme Court has always interpreted the statutory language more narrowly.<sup>39</sup> The Court has never, however, announced a clear

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Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369 (1980) (amending 28 U.S.C. § 1331).

36. See § 2(a), 94 Stat. at 2369 (amending 28 U.S.C. § 1331). Thus, since 1980, any specific mention of federal district courts in a statute creating a new federal cause of action has jurisdictional meaning only inasmuch as it protects the action from the repeal of 28 U.S.C. § 1331. See *infra* note 342. Before the amount in controversy requirement was repealed, explicitly mentioning federal district courts had the effect of permitting jurisdiction even if the amount in controversy did not satisfy § 1331. See *Goss v. San Jacinto Junior College*, 588 F.2d 96, 97-98 (5th Cir. 1979) (holding that federal jurisdiction over § 1983 claims was proper under 28 U.S.C. § 1343 (1976)—which does not have an amount in controversy requirement—even if the amount in controversy requirement of § 1331 was not met); *Caidin v. United States*, 564 F.2d 284, 286 n.2 (9th Cir. 1977) (stating that the question of § 1331 jurisdiction, and § 1331's amount in controversy requirement, was irrelevant in light of the explicit grant of federal jurisdiction over personal injury actions against the United States in 28 U.S.C. § 1346(b) (1994)).

37. See Chemerinsky, *supra* note 28, § 5.2.1, at 253.

38. Compare 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") with U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

39. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983) (noting distinction between the Constitutional and statutory meanings of "arising under"); see also Chemerinsky, *supra* note 28, § 5.2.3, at 263; Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 21-22 (1990); William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, The Policies of Clear Statement, and Federal Jurisdiction*, 58 Ind. L.J. 211, 226-28 (1982) (discussing reasons for the narrow interpretation). There is very little legislative history to inform interpretations of § 1331. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983) (noting § 1331's "limited" legislative history); James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. Penn. L. Rev. 639, 642-43 (1942) (asserting that "the history of [§ 1331] . . . yields no reason for its enactment" and characterizing § 1331 as "'sneak' legislation"). What legislative history does exist indicates Congressional intent that the statute be read as co-extensive with the constitutional grant of jurisdiction. See 2 Cong. Rec. 4986 (1874) (statement of Sen. Carpenter). Commentators have argued that the Supreme Court has "treated section 1331 as a general delegation of power to fashion their own jurisdiction," Luneburg, *supra*, at 228, and "abandoned all pretense that it is following Congress's intent in enacting [§ 1331]." Friedman, *supra*, at 21-22. Some commentators, however, have suggested that the paucity of legislative history surrounding § 1331 made the Court reluctant to assume that Congress intended the far-reaching effects that a broad reading would have entailed. See Ernest J. London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 Mich. L. Rev. 835, 840 (1959); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 162 (1953) (arguing that Congress was not confronted with the consequences of a broad reading of § 1331 and thus it would be "blind subservience to form" for courts to interpret it broadly). Indeed, this position has support in the



test for deciding when a case fits the definition of "arising under" for § 1331 purposes.<sup>40</sup> The Court's clearest statement has been that district court jurisdiction exists in "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."<sup>41</sup>

One of the Supreme Court's earliest attempts to define § 1331 jurisdiction was Justice Holmes' statement, "[a] suit arises under the law that creates the cause of action."<sup>42</sup> Holmes intended his formulation of "arising under" to be a principle of exclusion.<sup>43</sup> In other words, suits where federal law did not create the cause of action would *not* "arise under" federal law. Courts, however, have noted that it "is more useful for inclusion than for the exclusion for which it was intended."<sup>44</sup> Nevertheless, in the 82 years since Holmes' statement, no

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Supreme Court's jurisprudence. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371 (1959) (stating that it is difficult to accept that a "most far-reaching change" in maritime jurisdiction was effected "subterraneously" by § 1331).

40. See Chemerinsky, *supra* note 28, § 5.2.3, at 263; Wright, *supra* note 35, § 17, at 101; Michael D. Moberly, *Begging the Federal Question: Removal Jurisdiction in Wrongful Discharge Cases*, 20 Seattle U. L. Rev. 81, 89 (1996).

41. *Franchise Tax*, 463 U.S. at 27-28. The term "well-pleaded complaint" refers to the requirement that the federal question appear on the face of the complaint, and not as a defense. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1968); see also Chemerinsky, *supra* note 28, § 5.2.3, at 263-68 (explaining the well-pleaded complaint rule); Wright, *supra* note 35, § 18, at 108-13 (same). The meaning of "substantial question of federal law" is unclear, see Chemerinsky, *supra* note 28, § 5.2.3, at 269-73 (tracing the Supreme Court's decisions in this area); Wright, *supra* note 35, § 17, at 106 (noting that there are "no clear answers" in this area), and there have been proposals to reform this area of jurisdictional law. See, e.g., Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages The Purposes of Federal Question Jurisdiction*, 38 Hastings L.J. 597 (1987) (arguing that federal question jurisdiction should exist whenever the resolution of a question of federal law will determine the outcome of the case); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 Ind. L. J. 17, 22, 26 (1984) (arguing for using Justice Holmes' statement in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), as a principle of exclusion); Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948 (1989) (proposing the elimination of substantial federal question jurisdiction for state law claims).

42. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

43. See Chemerinsky, *supra* note 28, § 5.2.3, at 269; see also Hirshman, *supra* note 41, at 26-28 (analyzing the statement in conjunction with Holmes' dissent in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214-15 (1921), to determine Holmes' intent).

44. *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964); see also *In re Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 878 F.2d 1096, 1100 (8th Cir. 1989) ("We recognize that Justice Holmes' test for determining the extent of federal jurisdiction is more useful as a test for inclusion rather than exclusion."); *Enders v. American Patent Search Co.*, 535 F.2d 1085, 1089 (9th Cir. 1976) ("[The Holmes test] is still 'useful for inclusion [as opposed to] the exclusion for which it was intended.' . . . [We] rely on it for its limited application: if a case meets the Holmes test, at least that case 'arises under' regardless of what ultimate test is applied." (quoting *T. B. Harms*, 339

court had ever held that Congress created a cause of action outside the statutory grant of federal question jurisdiction until the Fourth Circuit examined the TCPA in *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*<sup>45</sup> There, the court held that the federal private right of action in the TCPA did not "arise under" § 1331.<sup>46</sup>

Even prior to Holmes' test, the Supreme Court had found that a federal cause of action did not "arise under" federal law for the purposes of § 1331 only in very limited cases involving mining rights.<sup>47</sup> These cases were brought to enforce federal rights created by U.S. Revised Statutes sections 2325 and 2326, which provided for federal registration of mining claims.<sup>48</sup> The most prominent of these cases was *Shoshone Mining Co. v. Rutter*.<sup>49</sup>

In *Shoshone Mining*, the Court held that a suit under sections 2325 and 2326 to determine mining rights did not "arise under" the laws of the United States for the purposes of the jurisdictional statute.<sup>50</sup> The rules of decision were to be taken from state or territorial law, as long as that law did not conflict with federal law.<sup>51</sup> The Court held that the command to look to state law for the rules of decision weighed against federal jurisdiction, because any "inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed."<sup>52</sup> The Court noted that litigants might have to travel great distances to litigate in federal court.<sup>53</sup> The Court also found it significant that Congress had chosen not to explicitly grant federal jurisdiction in the statute without an amount-in-controversy requirement.<sup>54</sup> Thus, litigants with claims totaling less than the

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F.2d at 827) (footnote omitted)). These courts recognize that although an action created by federal law falls within § 1331's definition of "arising under," the fact that an action is created by state law does *not* necessarily place it beyond § 1331. *See supra* note 41 (discussing § 1331 jurisdiction when state law provides the cause of action but there is a substantial question of federal law).

45. 106 F.3d 1146 (4th Cir. 1997).

46. *Id.* at 1158.

47. *See Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912) (collecting cases).

48. U.S. Rev. Stat. § 2325 (now codified at 30 U.S.C. § 29 (1994)) established procedures for registering mining claims with the federal government. U.S. Rev. Stat. § 2326 (now codified at 30 U.S.C. § 30 (1994)) established procedures for resolving disputed claims.

49. 177 U.S. 505 (1900).

50. *Id.* at 505-06. U.S. Rev. Stat. § 2326 required an adverse claimant—someone who filed a claim to mining rights already claimed by someone else—"to commence proceedings in a court of competent jurisdiction[ ] to determine the question of the right of possession." *See* U.S. Rev. Stat. § 2326 (now codified at 30 U.S.C. § 30 (1994)).

51. *Shoshone Mining*, 177 U.S. at 507-08.

52. *Id.* at 509 (quoting *Miller's Executors v. Swann*, 150 U.S. 132, 137 (1893)).

53. *Id.* at 513.

54. *Id.* at 510-11.

\$2000 minimum then required under the general federal question statute were forced to bring suit in state court.<sup>55</sup>

In other words, Congress did not deem the matter of the jurisdiction of [Federal] courts so essential a part of the administration of the land laws . . . as to vest in them jurisdiction of all such controversies, but left a large if not a major portion of them to be determined in the state courts.<sup>56</sup>

Although *Shoshone Mining* has been called “an anomalous turn-of-the-century case,”<sup>57</sup> it has never been explicitly overruled by the Supreme Court and, presumably, remains good law.<sup>58</sup> At least one federal court, however, has taken jurisdiction over a claim under 30 U.S.C. § 30, the same statute at issue in *Shoshone Mining*, since Justice Holmes’ statement in *American Well Works*.<sup>59</sup>

Thus, 28 U.S.C. § 1331 provides federal jurisdiction whenever federal law creates the cause of action, with the possible *Shoshone Mining* exception<sup>60</sup> of actions where the rules of decision are to be taken from state law. Yet, Congress continues to include jurisdictional language in statutes that create federal causes of action. The following section will examine the language Congress uses and its reasons for doing so.

### B. Specific Grants of Jurisdiction

Despite the general grant of federal question jurisdiction in § 1331, Congress has often used jurisdictional language in statutes that create a federal right of action.<sup>61</sup> When construing these or any other statutes, courts begin “with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which

55. An amount in controversy requirement was part of the original general federal question jurisdiction statute. See *supra* notes 35-36 and accompanying text.

56. *Shoshone Mining*, 177 U.S. at 511.

57. *Blackmon Auctions, Inc. v. Van Buren Truck Ctr., Inc.*, 901 F. Supp. 287, 291 (W.D. Ark. 1995). In *Shoshone Mining*, the Court was faced with a number of factors that are unlikely to reoccur today: a statutory scheme enacted before the general federal question statute, see *supra* notes 15-16 and accompanying text, a lack of easily accessible federal courts in the area where claims were likely to be brought, see *supra* note 53 and accompanying text, and an amount in controversy requirement in the general federal question statute, see *supra* notes 54-56 and accompanying text.

58. See Chemerinsky, *supra* note 28, § 5.2.3, at 269 & n.76.

59. See *Fargo v. McAlester Fuel Co.*, 532 F.2d 149, 151 & n.1 (9th Cir. 1976) (recognizing that the action before the court was a 30 U.S.C. § 30 claim and reaching the merits with no mention of *Shoshone Mining*).

60. See *supra* notes 47-56 and accompanying text.

61. See generally Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 3569-85 (2d ed. 1984) (describing specific jurisdictional grants).

it occurs.”<sup>62</sup> In addition, courts must attempt to give meaning or effect to every word in a statute.<sup>63</sup>

In most cases, the plain language of a jurisdictional provision in a statute is unambiguous. For example, Congress has provided that an action “may be brought only in” a federal district court,<sup>64</sup> that district courts “shall have exclusive jurisdiction”<sup>65</sup> over an action, and that federal court jurisdiction over some cases shall be “exclusive of the courts of the States.”<sup>66</sup> Such language plainly confers federal jurisdiction while simultaneously divesting state courts of jurisdiction.<sup>67</sup>

Another example of clear statutory language is where Congress either explicitly mentions district courts and other courts of “competent jurisdiction,”<sup>68</sup> or provides explicitly for “concurrent” jurisdiction in federal and state courts.<sup>69</sup> This language grants jurisdiction to fed-

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62. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *see also BankAmerica Corp. v. United States*, 462 U.S. 122, 128 (1983) (stating that the starting point in statutory interpretation is the language of the statute itself); *Bread Political Action Comm. v. Federal Election Comm’n*, 455 U.S. 577, 580 (1982) (same); *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (same).

63. *See, e.g., Moskal v. United States*, 498 U.S. 103, 111-12 (1990) (rejecting a statutory interpretation that violates this principle); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

64. *See, e.g., 15 U.S.C. § 80a-35(b)(5)* (1994) (providing for exclusive federal jurisdiction for claims of securities holders against investment advisors of registered securities companies for breach of fiduciary duty); *30 U.S.C. § 1734(b)* (1994) (providing for exclusive federal jurisdiction for suits by states to recover moneys due with respect to any oil and gas leases on federal lands within the state).

65. *See, e.g., 7 U.S.C. § 25(c)* (1994) (providing for exclusive federal jurisdiction of private actions authorized under the laws regarding Commodities Exchanges); *15 U.S.C. § 78aa* (1994) (providing for exclusive federal jurisdiction of actions taken to enforce the laws regarding Securities Exchanges); *29 U.S.C. § 1132(e)* (1994) (providing for exclusive federal jurisdiction of civil enforcement actions under the Employee Retirement Income Security Act).

66. *See, e.g., 18 U.S.C. § 3231* (1994) (providing for exclusive federal jurisdiction for prosecutions under federal criminal laws); *28 U.S.C. § 1333* (1994) (providing for exclusive federal jurisdiction of cases of admiralty and maritime jurisdiction); *28 U.S.C. § 1338* (1994) (providing for exclusive federal jurisdiction of suits arising under the patent laws).

67. *See Tafflin v. Levitt*, 493 U.S. 455, 471 (1990) (Scalia, J., concurring).

68. *See, e.g., 12 U.S.C. § 4010(d)* (1994) (providing for concurrent jurisdiction of private actions against banks for violation of laws regarding funds availability); *15 U.S.C. § 1640(e)* (1994) (providing for concurrent jurisdiction over actions to enforce laws regarding consumer credit); *29 U.S.C. § 187* (1994) (providing for concurrent jurisdiction over civil suits to enforce the laws prohibiting unfair labor practices).

69. *See, e.g., 15 U.S.C. § 3007(c)* (1994) (providing for concurrent jurisdiction over civil actions under the laws regarding interstate horseracing); *28 U.S.C. § 1352* (1994) (providing for concurrent jurisdiction of any action on a bond executed under any law of the United States); *42 U.S.C. § 13981(e)(3)* (1994) (providing for concurrent jurisdiction over actions arising from violations of the Civil Rights Remedies for Gender-Motivated Violence Act).

eral courts, while keeping the federal action within state courts' general jurisdiction.<sup>70</sup>

In other statutes, Congress has declined to explicitly mention a particular forum. For example, it has provided that an action may be brought "in any court of competent jurisdiction"<sup>71</sup> or simply "a court."<sup>72</sup> These terms do not grant jurisdiction at all. Instead, they define the cause of action, which then must be brought in a court deriving its jurisdiction from another source. For state courts, this source is their status as courts of general jurisdiction.<sup>73</sup> For federal courts, this source is the general federal question jurisdiction statute, § 1331.<sup>74</sup>

There has been confusion when language defining a cause of action has referred to federal courts, but has been silent about state court jurisdiction.<sup>75</sup> Congress has used a wide variety of statutory language

70. See, e.g., *Foxe Lady, Inc. v. National Tea Co.*, 701 So.2d 761, 765 (La. Ct. App. 1997) ("29 U.S.C. § 187 expressly grants state and federal district courts concurrent jurisdiction."). State courts are courts of general jurisdiction, and thus are presumed to be competent to hear any case before them. See *Bomar v. State*, 300 S.W.2d 885, 887 (Tenn. 1957) (noting that if a Court is one of general jurisdiction, "there is a presumption that nothing shall be intended to be out of its jurisdiction"); see also *Black's Law Dictionary* 684 (6th ed. 1990) (defining general jurisdiction as "[s]uch as extends to all controversies that may be brought before a court within the legal bounds of rights and remedies").

71. See, e.g., 15 U.S.C. § 77k(a) (1994) (creating a right of action for securities holders to enforce laws prohibiting false statements in registration statements); 15 U.S.C. § 78t-1(a) (1994) (providing a private action to enforce laws prohibiting insider trading); 29 U.S.C. § 626(c)(1) (1994) (creating a right of action under the Age Discrimination in Employment Act).

72. See 47 U.S.C. § 223(c)(3) (1994) (creating a right of action for a provider of communications services denied access to customers under laws prohibiting obscene phone calls); 49 U.S.C. § 5112(d)(3)(A) (1994) (establishing a mechanism for states or Indian tribes to challenge interstate highway routes promulgated by the Secretary of Transportation).

73. See *supra* note 70 (defining general jurisdiction).

74. 28 U.S.C. § 1331 (1994). For examples where federal courts have taken jurisdiction of Age Discrimination in Employment Act ("ADEA") claims, authorized by 29 U.S.C. § 626(c), via § 1331, see *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 130 n.1 (3d Cir. 1997) (noting jurisdiction was properly exercised under 29 U.S.C. § 626(c) in conjunction with 28 U.S.C. § 1331); *Moore v. University of Notre Dame*, 968 F. Supp. 1330, 1332 (N.D. Ind. 1997) (exercising jurisdiction pursuant to 29 U.S.C. § 626(c) and 28 U.S.C. § 1331); *Johnson v. Cadillac Plastics Group, Inc.*, 908 F. Supp. 847, 850 (D. Colo. 1995) (same). At least one court, however, seemed to assume jurisdiction pursuant to 29 U.S.C. § 626(c) alone. See *White v. Lincoln Plating Co.*, 955 F. Supp. 98, 99 (D. Colo. 1997) ("As the plaintiff brings a claim under the ADEA, this Court has concurrent jurisdiction pursuant to 29 U.S.C. § 626(c).")

75. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 822 (1990) (noting the circuit split regarding jurisdiction over Title VII claims); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (noting the circuit split regarding jurisdiction over civil RICO actions); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 & n.3 (1981) (noting conflict regarding jurisdiction over suits arising under the Outer Continental Shelf Lands Act).

when creating actions in this manner.<sup>76</sup> Beginning in 1981, the Supreme Court ended the confusion with its decisions in *Gulf Offshore Co. v. Mobil Oil Corp.*,<sup>77</sup> *Tafflin v. Levitt*,<sup>78</sup> and *Yellow Freight System, Inc. v. Donnelly*.<sup>79</sup>

*Gulf Offshore*<sup>80</sup> overturned a sixteen-year-old decision of the Louisiana Court of Appeals, *Gravois v. Travelers Indemnity Co.*,<sup>81</sup> in which the Louisiana court held that the Outer Continental Shelf Lands Act<sup>82</sup> ("OCSLA") granted federal courts exclusive jurisdiction over suits arising from activities on the continental shelf.<sup>83</sup> The Supreme Court noted that there is a "presumption that state courts enjoy concurrent jurisdiction" over federal claims.<sup>84</sup> The presumption can be rebutted by an explicit statutory directive.<sup>85</sup> The Court observed that the language of OCSLA providing that the federal district courts "shall have original jurisdiction"<sup>86</sup> operated only to grant jurisdiction to federal courts.<sup>87</sup> Furthermore, the Court noted, "It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction."<sup>88</sup> Although the Court stated that the presumption favoring state court jurisdiction could also be rebutted by "unmistakable implication from legislative history[ ] or by a clear incompatibility between state-court jurisdiction and federal interests,"<sup>89</sup> neither factor weighed in favor of such a reading of OCSLA.<sup>90</sup>

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76. See, e.g., 12 U.S.C. § 3416 (1994) (suits "may be brought" in federal court); 18 U.S.C. § 1964(c) (1994) ("Any person injured . . . by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court."); 29 U.S.C. § 633a(c) (1994) ("Any person aggrieved may bring a civil action in any Federal district court."); 42 U.S.C. § 2000e-5(f)(3) (1994) ("Each United States district court . . . shall have jurisdiction of actions brought under this subchapter."); 43 U.S.C. § 1349(b) (1994) (providing that federal district courts "shall have jurisdiction of cases and controversies arising out of, or in connection with" certain operations conducted on the outer Continental Shelf).

77. 453 U.S. 473 (1981).

78. 493 U.S. 455 (1990).

79. 494 U.S. 820 (1990).

80. 453 U.S. 473 (1981).

81. 173 So.2d 550 (La. Ct. App. 1965).

82. Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (1953) (codified as amended in various sections of 43 U.S.C.). OCSLA provided that the federal district courts "shall have original jurisdiction of cases and controversies arising out of, or in connection with [certain] operations conducted on the outer Continental Shelf." See 43 U.S.C. § 1333(b) (1976) (stricken and moved as modified to 43 U.S.C. § 1349(b) (1994)).

83. *Gravois*, 173 So.2d at 556. The court noted: "Had Congress intended to grant concurrent jurisdiction to the State Courts it would have so specified in this Act." *Id.*

84. *Gulf Offshore*, 453 U.S. at 478.

85. *Id.*

86. See *supra* note 82.

87. *Gulf Offshore*, 453 U.S. at 478-79.

88. *Id.* at 479.

89. *Id.* at 478.

90. *Id.* at 484.

The Court was presented with a similar question in *Tafflin*.<sup>91</sup> The statute at issue in *Tafflin* was 18 U.S.C. § 1964(c), which authorizes federal jurisdiction over civil RICO suits.<sup>92</sup> Because there was “nothing in the language of RICO . . . to suggest that Congress ha[d], by affirmative enactment, divested the state courts of jurisdiction,” *Tafflin* argued that the legislative history revealed Congress’s intent to provide for exclusive federal jurisdiction.<sup>93</sup> That history, however, contained no indication that Congress had ever even considered the question of concurrent jurisdiction.<sup>94</sup> The Court declined to impute intent from this silence.<sup>95</sup> Justice Scalia, concurring, labeled the legislative history and conflict language in *Gulf Offshore*<sup>96</sup> dicta, and argued that the only appropriate indicator of congressional intent was the plain language of the statute.<sup>97</sup>

*Yellow Freight System*,<sup>98</sup> decided the same term as *Tafflin*,<sup>99</sup> tracked the holding of the latter almost exactly. The plain language of the statute in question provided that “[e]ach United States district court . . . shall have jurisdiction of [private] actions” brought to enforce Title VII.<sup>100</sup> The Court held that this language did not “expressly confine[ ] jurisdiction to federal courts or oust[ ] state courts of their presumptive jurisdiction.”<sup>101</sup> The Court’s analysis of the legislative history found even stronger evidence for exclusive federal jurisdiction than it confronted in *Tafflin*—several passages indicating that many lawmakers “fully expected that all Title VII cases would be tried in federal court.”<sup>102</sup> The Court ultimately found this unpersuasive:

That expectation, even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction. Like its plain text, the legislative history of the Act affirmatively describes the jurisdiction of the federal courts, but is completely silent on any role of the state courts over Title VII claims.<sup>103</sup>

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91. *Tafflin v. Levitt*, 493 U.S. 455 (1990).

92. The statute specifically provides that “[a]ny person injured in his business or property by reason of a violation of [the criminal RICO statute] may sue therefor in any appropriate United States district court.” 18 U.S.C. § 1964(c) (1994).

93. *Tafflin*, 493 U.S. at 460-61.

94. *Id.* at 461.

95. *Id.* at 462 (“To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal.”).

96. *See supra* note 89 and accompanying text.

97. *See Tafflin*, 493 U.S. at 469-73 (Scalia, J., concurring).

98. *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990).

99. *See supra* notes 91-97 and accompanying text.

100. 42 U.S.C. § 2000e-5(f)(3) (1994). Title VII prohibits unlawful discrimination in employment. *See* 42 U.S.C. § 2000e-2 (1994).

101. *Yellow Freight*, 494 U.S. at 823.

102. *Id.* at 824 & n.4.

103. *Id.* at 824-25.

Although the Court analyzed the legislative history, it appeared to distance itself from the legislative history and conflict tests of *Gulf Offshore*,<sup>104</sup> stating that the absence of indications of Congressional intent to divest state courts of jurisdiction in the text "is strong, and arguably sufficient," evidence that Congress had no such intent.<sup>105</sup>

The holdings of the *Gulf Offshore* line of cases can be summarized as follows: First, state courts are presumed to have jurisdiction over federal actions by virtue of their status as courts of general jurisdiction of sovereign states in our federal system.<sup>106</sup> Second, although Congress has the power to foreclose state court jurisdiction over federal actions, courts will not assume it exercised that power by implication.<sup>107</sup> If Congress does not explicitly make federal jurisdiction exclusive, its intent must be shown by unmistakable legislative history, or there must be a clear incompatibility between state-court jurisdiction and federal interests.<sup>108</sup> In addition, considered against the backdrop of 28 U.S.C. § 1331,<sup>109</sup> the holdings implicitly recognize that the explicit mention of federal courts has little jurisdictional meaning. Although Congress's mention of federal courts grants them jurisdiction, those courts would have jurisdiction in any case via the general federal question jurisdiction statute.<sup>110</sup> After these cases, explicit mention of federal courts does not divest state courts of jurisdiction.<sup>111</sup> Thus, the language has definitional meaning, as part of a

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104. See *supra* note 89 and accompanying text.

105. *Yellow Freight*, 494 U.S. at 823 (emphasis added). This statement may indicate increasing support for Justice Antonin Scalia's position in *Tafflin*. See *supra* note 97 and accompanying text.

106. *Gulf Offshore* and its progeny each refer to a presumption of "concurrent" jurisdiction. See *Yellow Freight*, 494 U.S. at 824; *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Federal court jurisdiction in those cases was not presumed, however, but was granted explicitly through permissive language. See *supra* notes 82, 92, 100 and accompanying text. Thus the "presumption" referred to was that state courts had jurisdiction over federal actions.

107. See *supra* notes 80-105 and accompanying text.

108. See *id.* For more in-depth discussions of this line of cases, see Daniel J. Capra, *Discretion Must be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 Md. L. Rev. 632, 661-66 (1991) (discussing *Tafflin* and *Yellow Freight*); Yolanda Eleni Stefanou, *Concurrent Jurisdiction over Federal Civil RICO Claims: Is it Workable? An Analysis of Tafflin v. Levitt*, 64 St. John's L. Rev. 877 (1990); Meredith L. Hathorn, Comment, *The Outer Continental Shelf Lands Act: Vesting State Courts with Concurrent Jurisdiction—Gulf Offshore Co. v. Mobil Oil Corp.*, 6 Mar. Law. 327 (1981); Harsha Krishnan, Comment, *Tafflin v. Levitt: Concurrent Federal and State Jurisdiction Over Civil RICO*, 16 J. Contemp. L. 357 (1990); Elizabeth Moshang, Recent Development, *Concurrent State Court Jurisdiction in Title VII Claims: Yellow Freight System, Inc. v. Donnelly*, 33 B.C. L. Rev. 410 (1992).

109. See *supra* notes 25-60 and accompanying text.

110. 28 U.S.C. § 1331 (1994).

111. See *supra* notes 80-105 and accompanying text.



clause creating the cause of action, but no effective jurisdictional meaning unless § 1331 is repealed.<sup>112</sup>

Another important intersection of specific jurisdictional grants and the general federal question jurisdiction statute occurs where a specific grant of jurisdiction assigns a federal cause of action to courts other than the federal district courts.<sup>113</sup> The specific statutes typically do not explicitly mention § 1331.<sup>114</sup> Instead, the statutes usually grant "exclusive" jurisdiction to another federal court.<sup>115</sup> Thus, if they repeal all or part of § 1331's grant of jurisdiction, the repeal occurs by implication.<sup>116</sup>

It is a cardinal principle of statutory interpretation that repeals by implication are disfavored.<sup>117</sup> The Supreme Court has recognized only two "well-settled" categories of implied repeals:

- (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.<sup>118</sup>

Without an affirmative showing of an intention to repeal, repeal by implication is only justified when the earlier and later statutes are ir-

112. The explicit mention of federal courts in a statute creating a federal cause of action would also have meaning if Congress reinstated § 1331's amount-in-controversy requirement. *See supra* notes 35-36 and accompanying text. In that event, federal courts would retain jurisdiction over actions under statutes that explicitly mention federal courts in language defining a cause of action, regardless of the amount in controversy. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 546-50 (1972) (holding that jurisdiction over a § 1983 claim below § 1331's amount-in-controversy requirement was proper under 28 U.S.C. § 1343(3) (1970)).

113. *See, e.g.*, 15 U.S.C. § 57a(e)(5)(B) (1994) (vesting Courts of Appeals with exclusive jurisdiction to review rules promulgated by the Federal Trade Commission defining unfair trade practices); 28 U.S.C. § 1581 (1994) (vesting the Court of International Trade with exclusive jurisdiction over various federal actions).

114. *See, e.g.*, 8 U.S.C. § 1535(e)(2) (Supp. II 1996) (granting exclusive jurisdiction to the United States Court of Appeals for the District of Columbia over cases challenging the constitutionality of the detention of aliens); 28 U.S.C. § 1581 (granting exclusive jurisdiction over certain actions to the Court of International Trade with no mention of § 1331 in statute).

115. *See, e.g.*, 8 U.S.C. § 1535(e)(2) ("Jurisdiction over [a claim by an alien that continued detention violates the alien's rights under the Constitution] shall lie exclusively in the United States Court of Appeals for the District of Columbia Circuit."); 28 U.S.C. § 1581(b) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.").

116. An implied repeal occurs when a legislative enactment demonstrates an intent to repeal preexisting laws without mention or reference to such laws. *See* 1A Norman J. Singer, Sutherland Stat. Const. § 23.09 (5th ed. 1993).

117. *See Traynor v. Turnage*, 485 U.S. 535, 547 (1988); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 468 (1982); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

118. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (rejecting argument that the Securities Exchange Act partially repealed the National Bank Act by implication because "the 'two acts' . . . fall into neither of [the *Posadas*] categories").

reconcilable.<sup>119</sup> Otherwise, the rule is to give effect to both.<sup>120</sup> Although the Court has sometimes spoken of the rule disfavoring implied repeals as applying when a narrow, specific statute is arguably repealed by a broadly applicable one,<sup>121</sup> the Court has, in addition, consistently applied the rule when a broad statute is arguably partially repealed by a narrow one.<sup>122</sup>

When a specific jurisdictional statute grants *exclusive* jurisdiction over a federal cause of action to a court other than a federal district court, that statute irreconcilably conflicts with § 1331's grant of general federal question jurisdiction.<sup>123</sup> Consequently, it falls into the first category of implied repeals recognized by the Supreme Court.<sup>124</sup> When faced with arguments of implied partial repeals of other jurisdictional statutes, the Supreme Court has rejected them where the statutes could be reconciled.<sup>125</sup>

Nevertheless, in *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*,<sup>126</sup> the Fourth Circuit seemed to find that the Tucker Act<sup>127</sup> partially repealed § 1331 by implication.<sup>128</sup> The Tucker Act established the Court of Claims as an Article III court in which suits against the United States could be brought.<sup>129</sup> The jurisdictional portions of the Act grant the Court of Claims jurisdiction

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119. See *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

120. See *Borden*, 308 U.S. at 198.

121. See *Morton*, 417 U.S. at 550-51; see also *Watt v. Alaska*, 451 U.S. 259, 279-81 (1981) (Stewart, J., dissenting) (arguing that this is the only situation where the maxim against repeals by implication has force); *Radzanower*, 426 U.S. at 158 (holding that a "narrowly drawn, specific . . . provision . . . must prevail over [a] broader . . . provision").

122. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-84 (1996) (applying the rule to hold that § 27 of the Exchange Act did not partially repeal the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), by implication, and collecting related cases rejecting other implied partial repeals of § 1738); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not partially repeal the Tucker Act by implication); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 209-11 (1945) (holding that the Webb-Pomerene Act did not partially repeal the Sherman Act by implication).

123. Jurisdiction cannot be exclusive in one court if it is permitted in another. See *Black's Law Dictionary* 564 (6th ed. 1990) (defining "exclusive jurisdiction" as "[t]hat power which a court . . . exercises . . . to the exclusion of all other courts").

124. See *supra* note 118 and accompanying text.

125. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not partially repeal the Tucker Act by implication); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 546-50 (1972) (holding that 28 U.S.C. § 1331 did not effect an implied partial repeal of 28 U.S.C. § 1343(3) (1970)).

126. 106 F.3d 1146 (4th Cir. 1997).

127. The Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

128. See *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154-55 & n.2 (4th Cir. 1997).

129. The Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

over all claims against the United States,<sup>130</sup> and the Court of Claims and federal district courts concurrent jurisdiction over such suits under \$10,000.<sup>131</sup> The Tucker Act did not, however, explicitly grant the Court of Claims' *exclusive* jurisdiction over actions for more than \$10,000 against the United States.<sup>132</sup> Nevertheless, that jurisdiction is unquestionably exclusive.<sup>133</sup> The Fourth Circuit found that the "superfluous" grant of concurrent jurisdiction over claims under \$10,000 to federal district courts "leads quite naturally to the conclusion" that the grant of jurisdiction over claims for more than \$10,000 to the Court of Federal Claims is exclusive.<sup>134</sup>

It is doubtful, however, that § 1331 ever included jurisdiction over the kinds of federal claims addressed by the Tucker Act. The Court of Claims was created in 1855,<sup>135</sup> and because all government expenditures had to be authorized by Congress, it was the only avenue available to plaintiffs with claims against the government.<sup>136</sup> The Court of Claims could only issue advisory recommendations, which Congress was free to ignore.<sup>137</sup> Until the Tucker Act was passed in 1887,<sup>138</sup> the government enjoyed sovereign immunity from suit.<sup>139</sup> Thus, when the predecessor to § 1331 was passed in 1875,<sup>140</sup> it could not have conferred jurisdiction for claims against the United States unless it is also read as a waiver of sovereign immunity. Courts have consistently rejected this reading.<sup>141</sup> Thus, the Tucker Act did not enact an implied partial repeal of § 1331.

130. See 28 U.S.C. § 1491 (1994).

131. See *id.* § 1346.

132. See *id.* § 1491.

133. This is because the United States has not waived its sovereign immunity in other federal or state courts. See *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988); see also *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 172 (1976) ("[T]he Tucker Act . . . lodged exclusive jurisdiction in the Court of Claims for claims exceeding \$10,000."); Chemerinsky, *supra* note 28, § 9.2.4, at 565 (referring to jurisdiction of the Claims Court as "exclusive").

134. *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1155 n.2. (4th Cir. 1997).

135. Act of February 24, 1855, ch. 122, 10 Stat. 612.

136. See Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After Bowen v. Massachusetts*, 40 Cath. U. L. Rev. 571, 574-75 (1991).

137. See Chemerinsky, *supra* note 28, § 9.2.4, at 564.

138. The Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

139. See Chemerinsky, *supra* note 28, § 9.2.4, at 565 ("The Tucker Act is clearly a waiver of sovereign immunity for suits for money damages against the United States.").

140. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (current version at 28 U.S.C. § 1331 (1994)).

141. See, e.g., *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1021 (3d Cir. 1997) (noting that a plaintiff "may not rely on . . . 28 U.S.C. § 1331" when seeking to sue the United States); *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380, 1385 (5th Cir. 1989) ("[I]t is well settled that section 1331 'implies no general waiver of sovereign immunity.'" (quoting *A.L. Rowan & Son, General Contractors v. HUD* 661 F.2d 997, 1000 (5th Cir. 1980))); *Cotter Corp. v. Seaborg*, 370 F.2d 686, 692 n.15 (10th Cir. 1966)

The wide variety of jurisdictional language used by Congress to create federal actions must be read against the backdrop of § 1331 to be properly understood. Although in some cases the language has some jurisdictional effect, at times that effect is minimal or nonexistent. The courts have been careful, therefore, to read the language as restrictions on other sources of jurisdiction only when congressional intent has been explicit or the restriction is absolutely necessary to fulfill the purposes of the statute. The next section will examine the legislative history of the TCPA for evidence of either of these factors.

## II. LEGISLATIVE HISTORY OF THE TCPA

The history of the Telephone Consumer Protection Act can be traced back to 1989, when three bills aimed at regulating the telemarketing industry were introduced in the House of Representatives.<sup>142</sup> H.R. 628<sup>143</sup> and H.R. 2131<sup>144</sup> were both aimed at regulating the use of autodialers,<sup>145</sup> while H.R. 2184 was aimed at unsolicited facsimile advertisements ("junk faxes").<sup>146</sup> Each of these bills called for the Federal Communications Commission ("FCC") to promulgate regulations to curb abuses of these technologies.<sup>147</sup> None of the bills contained enforcement provisions, relying instead on FCC's enforcement power under the Communications Act of 1934.<sup>148</sup>

The bills were introduced at a time when the telemarketing industries' use of these emerging technologies had begun to attract legisla-

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("28 U.S.C. § 1331 . . . does not waive the sovereign's immunity."); Anderson v. United States, 229 F.2d 675, 677 (5th Cir. 1956) (stating that 28 U.S.C. § 1331 "cannot be relied on" to support a suit against the United States).

142. H.R. 628, 101st Cong. (1989), was introduced January 24, 1989, by Rep. Barney Frank. H.R. 2131, 101st Cong. (1989), was introduced April 26, 1989 by Rep. Marge Roukema. H.R. 2184, 101st Cong. (1989), was introduced May 2, 1989, by Rep. Edward J. Markey.

143. H.R. 628, 101st Cong. (1989). The bill would have amended the Communications Act to require phone companies to maintain lists of customers that objected to autodialed telephone calls. *Id.* The bill would also have prohibited autodialed calls to anyone on such lists. *Id.*

144. The Automated Telephone Solicitation Protection Act of 1989, H.R. 2131, 101st Cong. (1989). The bill would have amended the Communications Act to prohibit all autodialed calls before 9 a.m. and after 5 p.m., and require autodialers to release telephone lines no later than five seconds after the called party hung up. *Id.*

145. An autodialer is an automatic dialing device which has the capacity "to store or produce numbers to be called, using a random or sequential number generator; to dial such numbers; and to deliver a prerecorded message to the number dialed, with or without manual assistance." H.R. 2131.

146. The Facsimile Advertising Regulation Act, H.R. 2184, 101st Cong. (1989). The bill would have amended the Communications Act to require phone companies to maintain lists of customers that objected to unsolicited faxes. *Id.* The bill would also have prohibited unsolicited faxes to anyone on such lists. *Id.*

147. See H.R. 2184; H.R. 2131; H.R. 628.

148. 47 U.S.C. § 503 (1994). Section 503 authorizes the FCC to impose fines to enforce the Communications Act, which each of the bills would have amended. See H.R. 2184; H.R. 2131; H.R. 628. The provision authorizes penalties of up to \$10,000 per violation to be determined by the FCC. 47 U.S.C. § 503(b)(2)(C)-(D).

tive scrutiny. In 1989, legislation to curb industry abuses was introduced in 27 states,<sup>149</sup> and ultimately passed in both Maryland<sup>150</sup> and Connecticut.<sup>151</sup> Because of the federal preemption in the Communications Act of 1934,<sup>152</sup> however, states could only regulate intra-state calls.<sup>153</sup> Thus, federal legislation was needed to fully address the growing problem.<sup>154</sup>

Following Congressional hearings held on May 24, 1989,<sup>155</sup> all three bills were passed by the Subcommittee on Telecommunications and Finance and sent to the full Committee on Energy and Commerce. There, Rep. Markey combined the bills and reintroduced the legislation as the Telephone Advertising Regulation Act ("TARA") on July 18, 1989.<sup>156</sup> The new bill sought to establish a national "do not call" list of telephone subscribers who objected to receiving junk faxes or autodialed telemarketing calls.<sup>157</sup> TARA contained no new enforcement provisions, again relying on the FCC's enforcement powers under the Communications Act.<sup>158</sup>

As TARA was making its way through the legislative process,<sup>159</sup> the Senate history of the TCPA began with the Telemarketing & Con-

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149. See Paul Farhi, *Lawmakers Prepare Message to "Junk" Phone Solicitors; Complaints Prompt Moves to Curb Industry*, Washington Post, Sept. 29, 1989, at C11; Kathleen Killette, *Subcommittee Supports Fax Ad Regulation*, CommunicationsWeek, July 31, 1989, at 36.

150. Md. Code Ann. Commercial Law § 14-1313 (1990).

151. Conn. Gen. Stat. § 52-570c (1991). Ironically, opponents of the Connecticut bill, which prohibited junk faxes, provided Governor William O'Neill with a splendid example of the problem when they inundated his fax machine with messages urging a veto. See *Faxing Flurry Backfires*, *Law On Curbs OK'd*, Newsday, May 18, 1989, at 5. The Governor, who had been waiting for a report on flooding in the state to arrive by fax, promptly signed the measure. *Id.* A similar lobbying effort was tried in Maryland, with similar effect. See Michael J. Ybarra, *Computer-Driven Sales Pitches: Up to Their Ears in Junk, Phone and Fax Users Say*, L.A. Times, Aug. 8, 1989, at 1.

152. Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

153. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369-70 (1986) (holding that the Communications Act preempted state regulation of interstate calls); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498-1501 & n. 6 (D.C. Cir. 1984) (same); *Ivy Broad. Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (same).

154. See *supra* note 19.

155. *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce*, 101st Cong. (1989), microformed on Sup. Docs. No. Y4.En2/3:101-43 (U.S. Gov't Printing Office).

156. Telephone Advertising Regulation Act, H.R. 2921, 101st Cong. (1989).

157. *Id.*

158. 47 U.S.C. § 503 (1994). Section 503 authorizes the FCC to impose fines to enforce the Communications Act, which TARA would have amended. See Telephone Advertising Regulation Act, H.R. 2921, 101st Cong. (1989).

159. TARA was marked up and sent to the full Energy and Commerce Committee on July 20, 1989. See 136 Cong. Rec. D825 (daily ed. July 20, 1989). The bill was sent to the full House on May 15, 1990. See 136 Cong. Rec. D605 (daily ed. May 15, 1990). "Marking up" is the process by which a committee or subcommittee prepares the final

sumer Fraud and Abuse Prevention Act ("TCFAPA"), introduced by Senator Bryan on April 23, 1990.<sup>160</sup> The bill directed the Federal Trade Commission ("FTC") to promulgate "rules regarding telemarketing activities."<sup>161</sup> Among the rules the FTC was directed to consider was a ban on autodialed calls by equipment that did not immediately release the line if the called individual hung up.<sup>162</sup>

TCFAPA included three different enforcement provisions.<sup>163</sup> First, violations of the new rules were to be considered unfair or deceptive acts affecting commerce prohibited by § 5 of the Federal Trade Commission Act.<sup>164</sup> Second, a cause of action was to be created under which state attorneys general could bring enforcement actions.<sup>165</sup> Third, a private right of action was to be created, with a minimum amount in controversy of \$50,000.<sup>166</sup> The bill provided that the federal district courts "shall have exclusive jurisdiction" over these new civil actions.<sup>167</sup> Following subcommittee hearings,<sup>168</sup> the Senate Committee on Commerce, Science, and Transportation reported the bill to the full Senate on July 26, 1990.<sup>169</sup>

As TCFAPA awaited action by the full Senate, TARA came up for vote before the full House on July 30, 1990.<sup>170</sup> Five Representatives spoke in favor of the bill, and none spoke in opposition.<sup>171</sup> None of the Representatives mentioned the enforcement provisions.<sup>172</sup> The

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version of the bill it is sending to a larger deliberative body. For an excellent explanation of the legislative process, see Robert B. Dove, *Enactment of a Law* (visited February 7, 1998) <<http://thomas.loc.gov/home/enactment/enactlaw.html>>.

160. Telemarketing & Consumer Fraud and Abuse Prevention Act, S. 2494, 101st Cong. (1990).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* 15 U.S.C. § 45(a) prohibits unfair or deceptive acts affecting commerce. See 15 U.S.C. § 45(a) (1994). The Federal Trade Commission is authorized to order any person, partnership, or corporation to "cease and desist" any unfair or deceptive act or practice affecting commerce. See *id.* § 45(b). Violations of such orders can result in fines of up to \$10,000 per violation. See *id.* § 45(l).

165. Telemarketing & Consumer Fraud and Abuse Prevention Act, S. 2494, 101st Cong. § 4 (1990).

166. *Id.* § 5.

167. *Id.* §§ 4-5. This language has been interpreted by courts as conferring federal jurisdiction while permitting state jurisdiction. See *supra* notes 75-106 and accompanying text.

168. *Telemarketing and Consumer Fraud: Hearing on S. 1441 and S. 2494 before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transp.*, 101st Cong. (1990), *microformed on* Sup. Docs. No. Y4.C73/7:S.hrg.101-765 (U.S. Gov't Printing Office).

169. See 136 Cong. Rec. D953 (daily ed. July 26, 1990). The bill was amended slightly. See S. Rep. No. 101-396, at 3 (1990).

170. 136 Cong. Rec. H5818 (daily ed. July 30, 1990).

171. *Id.* at H5818-22. Reps. Markey, Ritter, Frank, Roukema, and McMillen spoke in favor of the bill. *Id.*

172. *Id.*

bill passed by voice vote.<sup>173</sup> The next day, the Bush administration threatened to veto the legislation.<sup>174</sup>

The Senate passed TFCAPA on October 22, 1990.<sup>175</sup> On October 26, TARA was placed on the Senate calendar.<sup>176</sup> Both bills died, however, when no further action was taken on them before the session ended on November 2, 1990.<sup>177</sup>

Rep. Markey reintroduced the legislation in the 102nd Congress as the Telephone Advertising Consumer Rights Act ("House TACRA bill") on March 6, 1991.<sup>178</sup> The House TACRA bill was substantively identical to TARA of the 101st Congress,<sup>179</sup> except that it included exceptions for calls made by non-profit organizations and to people with whom companies had a previously existing relationship.<sup>180</sup> No new causes of action, either public (by states' attorneys general) or private, were contemplated by the bill.<sup>181</sup> Following hearings on April 24,<sup>182</sup> the bill was approved by the Committee on Energy and Commerce's Subcommittee on Telecommunication and Finance on May 9,<sup>183</sup> and by the full Committee on July 30, 1991.<sup>184</sup>

Two bills, the Telephone Advertising Consumer Rights Act<sup>185</sup> ("Senate TACRA bill") and the Automated Telephone Consumer Protection Act,<sup>186</sup> ("TCPA bill") were introduced in the Senate during the same Congressional session. Both bills directed the FCC to promulgate regulations to restrict the use of junk fax and autodialed calls, and neither of them provided for any new causes of actions.<sup>187</sup> The only substantive difference between the bills was that the Senate

173. *Id.* at H5822.

174. *Bill to Restrict 'Junk Fax' Faces Opposition by Bush*, *Newsday*, Aug. 1, 1990, at 43. The Administration felt the bill was unnecessary because "[t]he number of complaints are small and there are already systems and infrastructures in place to deal with the problem." *Id.* (quoting Alixe Glen, White House deputy press secretary).

175. See 136 Cong. Rec. S16,488 (daily ed. Oct. 22, 1990). A technical amendment to the bill was also passed. See *id.* at S16484.

176. See 136 Cong. Rec. S17,295 (daily ed. Oct. 26, 1990).

177. See 136 Cong. Rec. D1454 (daily ed. Nov. 2, 1990).

178. Telephone Advertising Consumer Rights Act, H.R. 1304, 102nd Cong. (1991).

179. See *supra* notes 142-148 and accompanying text.

180. H.R. 1304.

181. *Id.*

182. *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce*, 102nd Cong. (1991), *microformed on* Sup. Docs. No. Y4.En2/3:102-9 (U.S. Gov't Printing Office).

183. 137 Cong. Rec. D563 (daily ed. May 9, 1991).

184. 137 Cong. Rec. D1011 (daily ed. July 30, 1991).

185. Telephone Advertising Consumer Rights Act, S. 1410, 102nd Cong. (1991). The bill was sponsored by Senator Pressler. *Id.* Senator Pressler also introduced S. 1442, by the same title, but no action was taken on it. See Telephone Advertising Consumer Rights Act, S. 1442, 102nd Cong. (1991).

186. Automated Telephone Consumer Protection Act, S. 1462, 102nd Cong. (1991). The bill was introduced by Senator Hollings. *Id.*

187. See S. 1410; S. 1462.

TACRA bill would have prohibited *all* unsolicited telemarketing calls,<sup>188</sup> while the TCPA bill only applied to autodialed calls.<sup>189</sup>

The Senate Committee on Commerce, Science, and Transportation held hearings on both bills on July 24, 1991, in Washington, D.C.,<sup>190</sup> on October 10, in Greenville, S.C.,<sup>191</sup> and October 11, in Columbia, S.C.<sup>192</sup> FCC Chairman Alfred C. Sikes submitted a statement to the Committee for the July 24 hearing, in which he expressed the administration's view that "special legislation may not be needed" and that some provisions of the bill would cost the FCC at least \$70 million initially and \$20 million annually in recurring costs.<sup>193</sup>

It was during testimony at the July 24 hearing where the private right of action and actions by states' attorneys general were first mentioned publicly.<sup>194</sup> Robert Bulmash, president and founder of Private Citizen, Inc., a privacy-rights organization, testified that his group favored "a civil action on the part of the consumer capable of being brought against telemarketers who call in defiance of our previously expressed will."<sup>195</sup> Bulmash also expressed skepticism about the FCC's willingness to enforce the law against telemarketers.<sup>196</sup> Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, similarly expressed doubt about the effectiveness of the law with only FCC enforcement,<sup>197</sup> but felt that private actions might be "difficult" to bring due to the "relatively small dollar amounts" involved.<sup>198</sup> Instead, he favored enforcement by the states:

I think that individual States, perhaps the attorney generals and consumer protection officials ought to, in these statutes, have the ability to bring an action against businesses where we generate certain levels of complaint. I think that would help the Federal Government. I think it would help make the statutes self-enforcing, and the potential, the real potential that someone in fact is going to en-

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188. See S. 1410.

189. See S. 1462.

190. S. 1462, *The Automated Telephone Consumer Protection Act of 1991*; S. 1410, *The Telephone Advertising Consumer Protection Act*; and S. 857, *Equal Billing for Long Distance Charges: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102nd Cong. (1991) [hereinafter "July 1991 TCPA Hearings"], microformed on Sup. Docs. No. Y4.C73/7:S.hrg.102-960 (U.S. Gov't Printing Office).

191. *Computerized Telephone Sales Calls and 900 Service: Hearings before the Senate Comm. on Commerce, Science, and Transp.*, 102nd Cong. 1 (1991), microformed on Sup. Docs. No. Y4.C73/7:S.hrg.102-918 (U.S. Gov't Printing Office).

192. *Id.* at 31.

193. See July 1991 TCPA Hearings, *supra* note 190, at 54-55 (statement of Alfred Sikes). Sikes stated that the problems caused by autodialers and unsolicited faxes could be addressed by already existing laws, "market conditions," or very limited new regulations the FCC was already considering. *Id.*

194. See *id.* at 28-29 (testimony of Steve Hamm and Robert Bulmash).

195. *Id.* at 29 (testimony of Robert Bulmash).

196. *Id.* (testimony of Robert Bulmash).

197. *Id.* at 32 (testimony of Steve Hamm).

198. *Id.* (testimony of Steve Hamm).



force the prohibitions contained in whatever legislation you ultimately find acceptable will, in fact, cause changes in the marketplace.<sup>199</sup>

A more concrete proposal was received from Michael Jacobson, cofounder of the Center for the Study of Commercialism.<sup>200</sup> Jacobson proposed a private right of action with damages set at \$500 plus attorney's fees.<sup>201</sup> Jacobson also expressed doubts about the effectiveness of FCC enforcement.<sup>202</sup> Support for civil sanctions was also expressed by Thomas Stroup, president of Telocator, an association of paging and cellular telecommunications providers.<sup>203</sup>

The provisions for the private right of action and action by states attorneys general were added as a result of information obtained in these hearings.<sup>204</sup> Senator Hollings noted,

Several parties, including the Federal Communications Commission <FCC> itself, raised concerns that the FCC might not have the resources to pursue violators of this bill. The will of the FCC to enforce the bill rigorously was also questioned, especially since the chairman of the FCC . . . indicate[d] that he believed the bill was unnecessary.<sup>205</sup>

Speaking specifically about the private right of action provision, the Senator said:

The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. The consumer outrage at receiving these calls is clear. Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue.

Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the

199. *Id.* at 29 (testimony of Steve Hamm).

200. The Center for the Study of Commercialism is a consumer group whose mission is "to help stop the unwanted permeation of advertising into practically every corner of American life." See July 1991 TCPA Hearings, *supra* note 190, at 40 (statement of Michael Jacobson).

201. *Id.* at 42, 44 (testimony of Michael Jacobson).

202. *Id.* at 44 ("If beleaguered citizens had to rely on the FCC, I am dubious that the law would ever be enforced.").

203. *Id.* at 47 (testimony of Thomas Stroup).

204. See 137 Cong. Rec. S16,205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

205. *Id.* at S16,206.

telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.<sup>206</sup>

Following these remarks, the Senate approved an amendment adding the new causes of action to the TCPA bill, and approved the bill itself by voice vote.<sup>207</sup> The Senate TACRA bill was also approved the same day.<sup>208</sup>

The House TACRA bill came up for vote in the House on November 18, 1991. Seven members spoke in favor of the bill, with none opposed.<sup>209</sup> There was no mention of the enforcement provisions of the bill.<sup>210</sup> Eight days later, the House considered the TCPA bill.<sup>211</sup> The House amended the bill to include some provisions of the House TACRA bill.<sup>212</sup> Once again, several Representatives spoke in favor of the bill, but none spoke of the civil enforcement provisions.<sup>213</sup> The House passed the TCPA bill as amended and sent it back to the Senate.<sup>214</sup>

The Senate approved the amendment the next day.<sup>215</sup> Senators Hollings and Pressler spoke briefly, and neither mentioned the new enforcement provisions.<sup>216</sup> President Bush, in signing the bill, also made no mention of the provisions.<sup>217</sup>

Because the private right of action was added as an amendment after the committee report on the bill was issued, Senator Hollings's statement is the only authoritative indication of congressional intent available. Because he explicitly cited the hearings as the impetus for the provision, this part has examined testimony relating to enforcement provisions. The next part will examine how circuit courts have read this history when determining Congressional intent.

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206. *Id.* at S16,205-06.

207. *Id.* at S16,208.

208. *See id.* at S16204. The private enforcement provisions that were added to S. 1462 were also added to S. 1410. *See id.* at S16,294-95.

209. *See* 137 Cong. Rec. H10,341-44 (daily ed. Nov 18, 1991). Reps. Markey, Richardson, Rinaldo, Roukema, Fish, Cooper, and Lent spoke in favor of the bill. *Id.*

210. *Id.*

211. 137 Cong. Rec. H11,307 (daily ed. Nov. 26, 1991).

212. *Id.* at H11,310. The portions of the House TACRA bill dealing with unsolicited faxes were inserted into the TCPA bill in place of that bill's fax provisions.

213. *Id.* at H11,310-15.

214. *Id.* at H11,315.

215. 137 Cong. Rec. S18,781-86 (daily ed. Nov. 27, 1991).

216. *Id.*

217. George W. Bush, Statement on Signing the Telephone Consumer Protection Act of 1991, 27 Weekly Comp. Pres. Doc. 1877 (Dec. 20, 1991).

### III. ANALYZING THE CIRCUIT DECISIONS HOLDING THAT STATE COURTS HAVE EXCLUSIVE JURISDICTION OVER PRIVATE TCPA ACTIONS

Only three circuits, the Fourth, Fifth and the Eleventh, have decided whether federal courts have jurisdiction over the private right of action under the TCPA.<sup>218</sup> The TCPA reads, in relevant part:

Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violations,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.<sup>219</sup>

Each circuit court held that state courts have exclusive jurisdiction over private TCPA actions.<sup>220</sup> This part examines the similarities and differences between the circuit courts' analyses.

Both the Fourth Circuit, in *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*,<sup>221</sup> and the Fifth Circuit, in *Chair King, Inc. v. Houston Cellular Corp.*,<sup>222</sup> held that the language providing that private TCPA actions "may" be brought in state court granted state courts jurisdiction over these actions.<sup>223</sup> Both courts also recognized that the primary question before them was whether the statute also implicitly granted concurrent jurisdiction to federal courts.<sup>224</sup> In *International Science*, the plaintiff argued that *Tafflin v. Levitt*<sup>225</sup> man-

218. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997); *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997).

219. 47 U.S.C. § 227(b)(3) (1994). In this Note, the phrase "if otherwise permitted by the laws or rules of court of a State" will be called the "opt out provision," because it apparently would allow a state to refuse to permit the action in its courts.

220. See *Nicholson*, 1998 WL 101942, at \*3-\*4; *Chair King*, 131 F.3d at 509; *International Science*, 106 F.3d at 1149.

221. 106 F.3d 1146 (4th Cir. 1997).

222. 131 F.3d 507 (5th Cir. 1997).

223. See *Chair King*, 131 F.3d at 511 ("The TCPA . . . expressly grants jurisdiction to state courts . . ."); *International Science*, 106 F.3d at 1151 ("In using the customary 'may' language for conferring jurisdiction, Congress . . . authorizes jurisdiction by stating that an action *may* be brought there." (footnote omitted)).

224. See *Chair King*, 131 F.3d at 514 ("[W]e are presented with the question of whether Congress intended to grant federal courts implied concurrent jurisdiction of federal claims that it expressly granted state courts jurisdiction to adjudicate."); *International Science*, 106 F.3d at 1151 (addressing this question and concluding that Congress did not grant federal courts concurrent jurisdiction by use of permissive language authorizing state court jurisdiction).

225. 493 U.S. 455 (1990). *Tafflin* held that permissive language granting federal courts jurisdiction does not divest state courts of their presumptive jurisdiction over federal claims. See *supra* notes 91-97 and accompanying text.

dated that such permissive language operated to grant concurrent jurisdiction to both federal and state courts.<sup>226</sup> The Fourth Circuit rejected this argument, holding that permissive language authorizing state court jurisdiction cannot implicitly grant federal courts jurisdiction.<sup>227</sup> The *Chair King* plaintiffs made a similar argument to the Fifth Circuit, citing *Gulf Offshore Co. v. Mobil Oil Corp.*<sup>228</sup> for support.<sup>229</sup> The Fifth Circuit declined to apply *Gulf Offshore* to determine whether there was federal jurisdiction over private TCPA actions, and concluded that the TCPA did not grant federal courts jurisdiction.<sup>230</sup> The Eleventh Circuit subsequently adopted these holdings.<sup>231</sup>

Both the Fourth and Fifth Circuits found support for the holding that the language creating the TCPA's private action did not grant federal courts jurisdiction in other provisions of the TCPA, the rest of the Communications Act, and the legislative history of the TCPA.<sup>232</sup> Both courts found it "significant" that Congress provided for exclusive federal court jurisdiction over actions brought by states<sup>233</sup> under the TCPA.<sup>234</sup> Moreover, the courts noted that in other portions of the Communications Act, Congress has specifically provided for concurrent jurisdiction in federal and state courts.<sup>235</sup> Both courts also specifically cited Senator Hollings's statement on the Senate floor<sup>236</sup> for support, stating: "While Senator Hollings did not explicitly say that *only* state court jurisdiction was appropriate, we believe the clear thrust of his statement was consistent with the bill's text that state courts were the intended fora for private TCPA actions."<sup>237</sup> The Fifth Circuit also suggested that if Congress had intended federal court jurisdiction over private TCPA actions, the TCPA would have included provisions making it possible for consumers to easily recover damages

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226. See *International Science*, 106 F.3d at 1152.

227. *Id.* (holding that 47 U.S.C. § 227(b)(3) (1994) did not grant jurisdiction to federal district courts).

228. 453 U.S. 473 (1981). *Gulf Offshore* held that permissive language granting federal courts jurisdiction does not divest state courts of their presumptive jurisdiction over federal claims. See *supra* notes 80-90 and accompanying text.

229. *Chair King*, 131 F.3d at 514.

230. See *id.*

231. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998) (citing *Chair King* and *International Science*).

232. See *Chair King*, 131 F.3d at 512-13; *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152-53 (4th Cir. 1997).

233. 47 U.S.C. § 227(f)(2).

234. See *Chair King*, 131 F.3d at 512; *International Science*, 106 F.3d at 1152.

235. See *Chair King*, 131 F.3d at 512-13 (citing 47 U.S.C. §§ 207, 214(c), 407, 551(f)(1), 553(c)(1), 555(a), 605(e)(3)(A)); *International Science*, 106 F.3d at 1152 (citing 47 U.S.C. §§ 214(c), 407, 415(f), 553(c)(1), 555(a), 605(e)(3)(A)). But see *infra* notes 363-66 and accompanying text (citing other sections of the Communications Act where Congress used ambiguous statutory language).

236. See *supra* notes 204-06 and accompanying text.

237. *International Science*, 106 F.3d at 1153; see also *Chair King*, 131 F.3d at 513 (quoting *International Science*).

in federal court without an attorney.<sup>238</sup> The *Chair King* court concluded that Congress's failure to include such provisions meant it did not intend federal courts to hear private TCPA claims.<sup>239</sup>

Both the Fourth and Fifth Circuits also referred to the line of cases where the Supreme Court considered whether there was an implied right of action in a federal statute.<sup>240</sup> To find an implied right of action, courts must infer congressional intent to create such an action in "the language of the statute, the statutory structure, or some other source."<sup>241</sup> Although both circuits recognized that the question before them was different than the issue of an implied right of action,<sup>242</sup> they nevertheless noted that because Congress created a remedy in state court, it would flout congressional intent to find an additional remedy in federal court.<sup>243</sup>

The circuit courts differed in their approach to the question of jurisdiction over private TCPA actions pursuant to § 1331. The Fourth Circuit observed that § 1331's "arising under" is narrower than the similar constitutional language,<sup>244</sup> and that ultimately the scope of the district courts' jurisdiction depends on congressional intent.<sup>245</sup> Nevertheless, it recognized that because the TCPA private right of action was created by federal law, it fell among the "vast majority" of cases where federal question jurisdiction exists under § 1331.<sup>246</sup>

The court went on to note, however, that despite the usual reliability of the Holmes test, "[the Supreme] Court has sometimes found that formally federal causes of action were not properly brought

238. See *Chair King*, 131 F.3d at 513.

239. See *id.*

240. See *id.* at 511-12; *International Science*, 106 F.3d at 1155. An implied right of action is a private right to sue for a violation of a regulatory statute, even though the statutory scheme does not explicitly mention private suits. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (finding an implied right of action for violations of Title IX, which prohibits gender discrimination in education); see also Fallon et. al., *supra* note 27, at 839-46 (discussing implied rights of action).

241. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

242. See *Chair King*, 131 F.3d at 511 (adverting to implied right of action cases "by analogy"); *International Science*, 106 F.3d at 1155 (noting that because the TCPA explicitly created a private remedy, the court did not need to consider the question of an implied right of action).

243. See *Chair King*, 131 F.3d at 512 ("[W]here a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.") (quoting *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989)); *International Science*, 106 F.3d at 1155 ("[If] Congress did not intend a private federal remedy for violations of the statute that it enacted . . . it would flout congressional intent to provide a private federal remedy for the violation of the federal statute." (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 811-12 (1986))).

244. *International Science*, 106 F.3d at 1153; see also *supra* notes 38-39 and accompanying text.

245. *International Science*, 106 F.3d at 1153-54.

246. *Id.* at 1154 ("A suit arises under the law that creates the cause of action." (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.))).

under federal-question jurisdiction."<sup>247</sup> When the Supreme Court has found that Congress intended for state court jurisdiction to be exclusive, as in *Shoshone Mining Co. v. Rutter*, it has honored that intent despite unclear language.<sup>248</sup> Furthermore, the court listed several partial repeals of § 1331, including an implied repeal by the Tucker Act.<sup>249</sup> Thus, § 1331 gives the district courts jurisdiction only if no specific statute assigns jurisdiction elsewhere.<sup>250</sup> A federal law that creates a cause of action may also manifest a particular intent to assign jurisdiction to courts other than the federal district courts.<sup>251</sup> The court concluded that the TCPA manifested such an intent in the explicit mention of State courts, thus defeating jurisdiction under 28 U.S.C. § 1331.<sup>252</sup> The Eleventh Circuit likewise adopted this approach.<sup>253</sup>

The Fifth Circuit began its analysis by synthesizing cases interpreting § 1331 and stating that the Holmes test<sup>254</sup> is "only a starting point" for determining on which court or courts Congress intended to confer jurisdiction.<sup>255</sup> "Inferior federal courts' 'federal question' jurisdiction ultimately depends on Congress's intent as manifested by the federal statute creating the cause of action."<sup>256</sup> According to the *Chair King* court's analysis, § 1331 does not grant jurisdiction unless Congress indicates an intent for § 1331 to do so in the statute creating a particular federal cause of action.<sup>257</sup> Thus, it was unnecessary for the court to

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247. *Id.* at 1154 (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986)).

248. *Id.* at 1154 (citing *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 511 (1900)). For a brief explanation of *Shoshone*, see *supra* notes 49-59 and accompanying text.

249. *International Science*, 106 F.3d at 1154-55 & n.2. The court noted that the Tucker Act's explicit announcement of concurrent jurisdiction in 28 U.S.C. § 1346 would be superfluous if § 1331 already conferred concurrent jurisdiction, thus leading "quite naturally" to the conclusion that 28 U.S.C. § 1491 confers exclusive jurisdiction to the Court of Federal Claims. *Id.* at 1155 n.2. Similarly, the explicit mention of state courts in the TCPA would be superfluous as jurisdictional language, because state courts are presumed to have concurrent jurisdiction to enforce federal laws. *Id.* But see *supra* notes 127-41 and accompanying text (arguing that the Tucker Act was not an implied partial repeal of § 1331).

250. *International Science*, 106 F.3d at 1154.

251. *Id.* at 1155.

252. *Id.*

253. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998) (citing *International Science*).

254. See *supra* notes 42-44 and accompanying text.

255. *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 510-11 (5th Cir. 1997).

256. *Id.* at 511 (citing *International Science*, 106 F.3d at 1153-55).

257. *Id.* at 510-11. No other court has ever described § 1331's operation in this manner. Defining § 1331 this way, however, is consistent with some commentary arguing that § 1331 permits the federal courts to fashion their own rules in the jurisdictional area. See *Luneburg*, *supra* note 39, at 228 ("[S]ection 1331 can be seen as a delegation of law-making power in the procedural area that has its analogue in the substantive sphere in the Sherman Antitrust Act."); see also *supra* note 39 (citing commentators who assert that the Court has implicitly taken this view).

address the repeal of § 1331 jurisdiction by the TCPA because the TCPA manifested no intent for § 1331 to apply.<sup>258</sup>

Both the Fourth and Fifth Circuits also found support for their decisions in analyses not undertaken by other courts interpreting the TCPA. The Fifth Circuit noted that "a statute should be construed in a way that gives meaning and effect to all [its] provisions."<sup>259</sup> The *Chair King* court observed that because of the presumption in favor of state court jurisdiction,<sup>260</sup> the explicit mention of state courts would be unnecessary to confer concurrent jurisdiction on state and federal courts.<sup>261</sup> Thus, to give the mention of state courts meaning, it must be construed "as more than a confirmation of concurrent jurisdiction."<sup>262</sup>

The Fourth Circuit addressed the constitutional questions posed by the TCPA.<sup>263</sup> Specifically, International Science argued that if state court jurisdiction was exclusive, the provisions permitting states to opt out of jurisdiction<sup>264</sup> violated the equal protection component of the Fifth Amendment.<sup>265</sup> Citizens of states that opted out would be deprived of a federal right under the TCPA, while citizens of states that permitted the private actions would enjoy the federal right, thus resulting in unequal protection of the laws.<sup>266</sup> Furthermore, International Science argued that the grant of exclusive state court

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258. See *Chair King*, 131 F.3d at 511, 513 (defining the question presented by the case as whether Congress implicitly granted federal courts concurrent jurisdiction over private TCPA actions).

259. *Chair King*, 131 F.3d at 512.

260. See *id.* (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Tafflin v. Levitt*, 493 U.S. 455, 459-61 (1990)). For brief descriptions of *Gulf Offshore*, *Tafflin*, and the presumption in favor of state court jurisdiction, see *supra* notes 80-97 and accompanying text.

261. *Chair King*, 131 F.3d at 512.

262. *Id.*

263. See *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1155-56 (4th Cir. 1997).

264. See *supra* note 219.

265. The Fifth Amendment provides, among other things, that no person shall be deprived of liberty without due process of law. U.S. Const. amend. V. The Fifth Amendment's Due Process Clause has an equal protection component that is substantively equivalent to the Fourteenth Amendment's Equal Protection Clause. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-18 (1995). The Equal Protection Clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

266. See *International Science*, 106 F.3d at 1156 (explaining International Science's argument).

jurisdiction violated the Tenth Amendment,<sup>267</sup> because it commandeered state courts for federal purposes.<sup>268</sup>

The court dispensed with the equal protection question on two grounds.<sup>269</sup> First, the court stated that even if some states opted out, citizens of those states would not be deprived of the equal protection of the law, because the substantive rights conferred by the statute would still be enforceable by the state or federal government.<sup>270</sup> Second, because the challenged classification was not based on a fundamental right or impermissible characteristic such as race, religion, or national origin, any equal protection challenge would subject the TCPA to mere rational basis scrutiny.<sup>271</sup> The court held that the TCPA's opt-out provision would pass rational basis scrutiny based on congressional findings suggesting a huge number of potential claims.<sup>272</sup>

The court also rejected the Tenth Amendment argument.<sup>273</sup> Congress "went out of its way to avoid overstepping the limits of the Tenth Amendment by explicitly recognizing the states' power to reject enforcement in their courts of the federally created right" by including the opt-out provision.<sup>274</sup> Thus, Congress avoided commandeering state resources in the way the Supreme Court found impermissible in *New York v. United States*.<sup>275</sup> The court cited this as further evidence that Congress intended to make state court jurisdiction exclusive, be-

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267. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court has held that the Tenth Amendment prohibits Congress from mandating state legislation, see *New York v. United States*, 505 U.S. 144 (1992), or commandeering state officials to enforce federal law, see *Printz v. United States*, 117 S. Ct. 2365 (1997).

268. See *International Science*, 106 F.3d at 1157.

269. *Id.* at 1156-57.

270. *Id.* at 1156 (noting that the "right to be free from unsolicited faxes" would still be enforceable by state attorneys general or the FCC).

271. *Id.* at 1156-57 ("Under [rational basis scrutiny], the Act is entitled to a strong presumption of validity, and must be sustained if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (quoting *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996))).

272. *Id.* at 1157.

273. *International Science*, 106 F.3d at 1157-58.

274. *Id.* at 1157.

275. 505 U.S. 144 (1992). *New York* involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to provide for the disposal of waste generated within their borders. See 42 U.S.C. § 2021c (1992). The Court held that the Tenth Amendment prohibited Congress from requiring the states to enact legislation. *New York*, 505 U.S. at 149. For a more in-depth discussion, see Richard D. Weiner, Casenote, *New York v. United States: Federalism and the Disposal of Low-Level Radioactive Waste*, 34 Nat. Resources J. 197 (1994); see also Martin H. Redish, *Doing it with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings Const. L.Q. 593 (1994) (criticizing the Court's decision).



cause there could be no question of commandeering if federal courts had concurrent jurisdiction.<sup>276</sup>

Thus, the Circuit Courts agreed that the language of the TCPA permitting state court jurisdiction did not implicitly grant federal courts concurrent jurisdiction, based on the text of the TCPA, its legislative history, and comparisons with other provisions of the Communications Act. The courts disagreed on the applicability of § 1331. The Fourth and Eleventh Circuits recognized that the TCPA arose under federal law for § 1331 purposes, but held that the TCPA had defeated § 1331 jurisdiction by assigning permissive jurisdiction to state courts. The Fifth Circuit held that § 1331 jurisdiction did not apply because Congress did not indicate in the TCPA that it intended § 1331 to apply. Only the Fifth Circuit held that it was necessary to interpret the TCPA's mention of state courts as excluding federal courts from jurisdiction to give such mention meaning and effect. Only the Fourth Circuit addressed the constitutional questions raised by the TCPA's private action. The following part examines the only decision to expressly hold that federal courts have jurisdiction over private TCPA actions, and argues that its analysis is correct.

#### IV. *KENRO, INC. v. FAX DAILY, INC.*<sup>277</sup> AND THE ARGUMENT FOR FEDERAL DISTRICT COURT JURISDICTION

Although the circuit courts correctly determined that the language of the TCPA does not explicitly grant federal courts jurisdiction over private TCPA actions,<sup>278</sup> the courts erred in their treatment of 28 U.S.C. § 1331. Section 1331 grants federal district courts jurisdiction over federal claims such as private TCPA actions.<sup>279</sup> Thus, if the TCPA's language permitting state court jurisdiction over private actions defeats federal jurisdiction under § 1331, the TCPA partially repeals § 1331 by implication.<sup>280</sup> None of the circuit courts interpreting the TCPA analyzed the legislative history with the rigor required<sup>281</sup> to find an intent to repeal § 1331 by implication.

Moreover, the Fourth Circuit's reasoning in *International Science* was explicitly rejected by Chief Judge Sarah Evans Barker of the Southern District of Indiana.<sup>282</sup> Two years earlier, in *Kenro, Inc. v.*

276. *International Science*, 106 F.3d at 1158 ("Apparently recognizing that the exclusivity of state court jurisdiction could create a problem . . . , Congress avoided any constitutional issue by refusing to coerce states to hear private TCPA actions . . .").

277. 904 F. Supp. 912 (S.D. Ind. 1995).

278. See *supra* notes 224-31 and accompanying text.

279. See *supra* notes 42-59 and accompanying text.

280. See *supra* notes 113-15 and accompanying text (discussing partial repeals of § 1331).

281. See *supra* notes 117-25 and accompanying text (discussing the doctrine of implied repeals).

282. See *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997).

*Fax Daily, Inc.*,<sup>283</sup> the judge had considered for the first time in any court the question of federal court jurisdiction over private TCPA actions.<sup>284</sup> The court found that federal courts had concurrent jurisdiction.<sup>285</sup> Part IV.A. examines that decision. Part IV.B. argues that it is correct and the circuit courts' analyses were faulty.

A. *KENRO, INC. v. FAX DAILY, INC.*<sup>286</sup>

Although there had been private TCPA cases filed or removed to federal courts before the *Kenro* decision,<sup>287</sup> *Kenro* was the first case where the jurisdiction of federal courts over such actions was challenged.<sup>288</sup> The case had been originally filed in state court, and removed by the defendant to federal court pursuant to 28 U.S.C. § 1441.<sup>289</sup> The plaintiff moved for remand, arguing that the TCPA provides for exclusive jurisdiction in state courts.<sup>290</sup>

The *Kenro* court began its analysis by recognizing that, because the TCPA is a federal law that expressly provides for a private cause of action, a complaint asserting a private TCPA claim "clearly presents a federal question."<sup>291</sup> Thus, jurisdiction is proper under 28 U.S.C. § 1331.<sup>292</sup> The court distinguished Supreme Court cases involving substantial federal questions in state causes of action,<sup>293</sup> noting that private TCPA actions do not involve any state law claims.<sup>294</sup>

The court recognized that to reach the conclusion that state courts have exclusive jurisdiction over private TCPA actions, it would have to find an implied partial repeal of § 1331.<sup>295</sup> The court refused to do

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283. 904 F. Supp. 912 (S.D. Ind. 1995).

284. *Id.* at 914 (noting that this question "ha[d] not been addressed by any court in the United States").

285. *Id.* at 915.

286. 904 F. Supp. 912 (S.D. Ind. 1995).

287. *See supra* note 24 and accompanying text (citing federal TCPA cases in which non-jurisdictional decisions were published).

288. *Kenro*, 904 F. Supp. at 914.

289. *Id.* at 912-13. 28 U.S.C. § 1441 authorizes removal to federal court of any case filed in state court in which the federal district courts have original jurisdiction. *See* 28 U.S.C. § 1441 (1994).

290. *Kenro*, 904 F. Supp. at 913.

291. *Id.* at 914.

292. *See id.* at 915.

293. *See, e.g.* *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986) (federal ingredient in state law claim); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-51 (1985) (same); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (same). In those cases, courts must determine whether the federal question is "substantial." *See supra* note 41 and accompanying text.

294. *Kenro*, 904 F. Supp. at 914.

295. *Id.* ("Plaintiff apparently concludes that by explicitly providing for actions in state court, Congress meant to revoke federal question jurisdiction provided for by 28 U.S.C. § 1331 . . ."); *see also supra* notes 116-25 and accompanying text (discussing implied repeals).

so.<sup>296</sup> The court denied a motion to reconsider following the Fourth Circuit's decision in *International Science*.<sup>297</sup>

Thus, the *Kenro* Court properly recognized the applicability of 28 U.S.C. § 1331 and declined to find an implied partial repeal. Its analysis, however, was not comprehensive and did not include the legislative history of the TCPA. The following part undertakes a more thorough analysis, including a review of the legislative history, to argue that federal courts have jurisdiction over private TCPA actions.

#### B. *Why federal district courts have jurisdiction over private TCPA actions*

Federal courts are courts of limited jurisdiction, possessing only that power authorized by a constitutional statute.<sup>298</sup> Once jurisdiction is granted, however, federal courts are not free to restrict that jurisdiction.<sup>299</sup> Congress granted federal district courts jurisdiction over federal causes of action in 28 U.S.C. § 1331.<sup>300</sup> Because Congress did not clearly divest that jurisdiction in the language of the TCPA,<sup>301</sup> it is improper for courts to adopt a rule that does so.

"A suit arises under the law that creates the cause of action."<sup>302</sup> As a principle of inclusion, this has not been seriously challenged once in the 82 years since it was announced.<sup>303</sup> Indeed, the Supreme Court has cited it approvingly many times.<sup>304</sup> It is only unreliable as a princi-

296. *Id.* at 915. ("[W]e will not assume that the language in the TCPA providing for a private right of action in state court was meant to repeal federal question jurisdiction which exists under 28 U.S.C. § 1331."). The court analogized the question of an implied repeal of § 1331 jurisdiction by the TCPA to the question of the implied repeal of the removal statute, 28 U.S.C. § 1441, by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). *Kenro*, 904 F. Supp. at 914-15. FIRREA provides that the Resolution Trust Corporation ("RTC") may remove cases to the District of Columbia or the district where the institution's principal business is located. See 12 U.S.C. § 1441a(1)(3). The Seventh Circuit held that this provision was not an implied repeal of § 1441 prohibiting RTC from removing cases to other district courts. See *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 68 (7th Cir. 1991). Instead, the provision permitted removal to the district courts listed *in addition to* those permitted by 28 U.S.C. § 1441. *Id.* It is important to note, however, that 28 U.S.C. § 1441 explicitly states that its provisions will apply "[e]xcept as otherwise expressly provided by Act of Congress." See 28 U.S.C. § 1441 (1994) (emphasis added). Title 28, section 1331 of the U.S. Code contains no such provision. See 28 U.S.C. § 1331 (1994).

297. See *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997).

298. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Aldinger v. Howard*, 427 U.S. 1, 15 (1976); *Gillis v. California*, 293 U.S. 62, 66 (1934); *United States v. Hudson*, 11 U.S. 21, 22, 7 Cranch 32, 33 (1812).

299. See *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

300. See *supra* notes 33-46 and accompanying text.

301. See *infra* notes 327-82 and accompanying text.

302. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

303. See *supra* note 45 and accompanying text.

304. See, e.g., *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citing *American Well Works*, 241 U.S. at 260); *National Farmers Union Ins. Cos. v.*

ple of exclusion: although a case asserting a claim created by federal law *necessarily* "arises under" that law, a case asserting a claim created by state law may still "arise under" federal law for the purposes of § 1331.<sup>305</sup>

The only cases ever to find a federal action did not "arise under" § 1331 were *Shoshone Mining* and its related cases.<sup>306</sup> The *Shoshone Mining* court relied on two specific statutory provisions to infer Congress's intent to have those claims heard exclusively in state court: the incorporation of state and local law as the rules of decision, and the amount-in-controversy requirement in the general federal question jurisdiction statute, which would not be met by the majority of actions under the statute at issue in *Shoshone Mining*.<sup>307</sup> Neither of those factors are present here.

Substantive rights under the TCPA are defined completely by the federal statute and FCC regulations.<sup>308</sup> Indeed, enforcement actions by the state or federal governments *must* be brought in federal court.<sup>309</sup> Thus, the federal courts need not delve into state and local law to adjudicate TCPA claims as they would have needed to under U.S. Rev. Stat. § 2326 in *Shoshone Mining*.<sup>310</sup>

Moreover, the scope of the general federal question jurisdiction statute has been expanded since *Shoshone Mining*. When Congress removed the amount-in-controversy requirement in 1980, it explicitly provided for a federal forum for all "arising under" cases, regardless of their size.<sup>311</sup> Thus, courts can no longer find that a federal right Congress establishes is not important enough to support § 1331 jurisdiction based on Congress's failure to provide for a federal forum in all actions to vindicate that right.<sup>312</sup>

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Crow Tribe of Indians, 471 U.S. 845, 850-51 (1985) (same); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (same); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (same). Arguably, the narrow interpretation of § 1331 has been a wholly judicial creation. See *Franchise Tax Bd.*, 463 U.S. at 8 n.8 (noting that the language of the statute tracks similar language in Article III, section 2 and its limited legislative history suggests that Congress's intent was to confer the whole power which the Constitution conferred); Friedman, *supra* note 39, at 21-22 (noting that "the Court has abandoned all pretense that it is following Congress's intent" in construing § 1331). Nevertheless, Congress has not addressed the Court's interpretations despite its revisions and re-enactments of the statute. See *id.* at 24 & n.134.

305. See *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964); *supra* note 44 and accompanying text.

306. See *supra* notes 47-56 and accompanying text.

307. See *supra* notes 51-55 and accompanying text.

308. See 47 U.S.C. § 227 (1994).

309. See *id.* § 227(f)(2); *id.* § 503(b)(3)(B) (directing the Attorney General to recover penalties assessed by the FCC, see *supra* note 148 and accompanying text, in a federal district court).

310. See *supra* notes 50-56 and accompanying text.

311. See *supra* note 36.

312. This is exactly what the Court did in *Shoshone Mining*. See *supra* notes 55-56 and accompanying text.

Assuming that *Shoshone Mining* is still good law,<sup>313</sup> it is nonetheless inapplicable to the TCPA private right of action. Because the TCPA is a federal law creating a right of action, it "arises under" federal law per the Holmes test.<sup>314</sup> The Fifth Circuit decision, however, treats § 1331 as if it is a mere factor to consider when divining the Congressional intent of a specific jurisdictional grant.<sup>315</sup> This cannot be the case. If it were, the existence of § 1331 would be considered evidence of congressional intent to grant federal jurisdiction when it uses language such as "any court of competent jurisdiction" or "a court."<sup>316</sup> Thus, distinctions in statutory language between "Federal and state courts," "a court," "federal courts and any other court of competent jurisdiction," and "any court of competent jurisdiction" would be meaningless.<sup>317</sup> Moreover, if § 1331 had to operate in conjunction with another statute to confer jurisdiction, it could not support jurisdiction of common-law federal claims. The Supreme Court, however, has held that it does.<sup>318</sup> Thus, jurisdiction is proper under § 1331 unless Congress enacted a partial repeal of § 1331 in the TCPA.<sup>319</sup>

Every court to analyze the text of the TCPA's private right of action provision has agreed that the language does not explicitly grant state courts exclusive jurisdiction.<sup>320</sup> Congress did not, therefore, enact an

313. See *supra* notes 57-59 and accompanying text.

314. See *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 913-14 (S.D. Ind. 1995).

315. See *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 511 (5th Cir. 1997) ("Inferior federal courts' 'federal question' jurisdiction ultimately depends on Congress's intent as manifested by the federal statute creating the cause of action."); *supra* notes 254-58 and accompanying text.

316. See *supra* notes 71-74 and accompanying text.

317. See *supra* notes 68-74 and accompanying text (noting that the explicit mention of federal courts grants those courts jurisdiction, but simply mentioning "a court" does not).

318. See *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) ("It is well settled that [§ 1331's] grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'" (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972))). But see *Lunenburg*, *supra* note 39, at 228 ("Section 1331 is largely a residual grant intended to cover those matters not falling within the specific grants.").

319. See *supra* notes 113-22 and accompanying text (discussing partial repeals of § 1331).

320. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1288 (11th Cir. 1998) (noting that "the Act is silent as to federal court jurisdiction"); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 511 (5th Cir. 1997) ("The TCPA is silent as to whether the express jurisdictional grant to state courts is exclusive or is coupled with an implicit concurrent grant of jurisdiction to federal courts."); *International Science & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1151 (4th Cir. 1997) ("Use of the term 'may' does not itself confer exclusive jurisdiction on the court mentioned."); *Murphy v. Lanier*, No. 97-CV-1784-BTM(POR), 1998 WL 154410, at \*3 (S.D. Ca. Mar. 30, 1998) ("[T]he use of the term 'may' in a jurisdictional provision of a statute does not by itself confer exclusive jurisdiction on the court mentioned explicitly."); *Foxhall Realty Law Offices v. Telecommunications Premium Servs., Ltd.*, 975 F. Supp. 329, 331 (S.D.N.Y. 1997) ("The statutory language [of § 227(b)(3)] explicitly confers *permissive* jurisdiction . . ." (emphasis added)); *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 914 ("[§227(b)(3)] has two possible interpretations: that state courts

explicit partial repeal of 28 U.S.C. § 1331 in the TCPA, as it has in other Acts.<sup>321</sup> The Fourth Circuit held that the language permitting private TCPA actions in state courts nonetheless defeated § 1331 jurisdiction.<sup>322</sup> That court, however, failed to consider the doctrine of implied repeals in its analysis.<sup>323</sup>

"[I]t is . . . a cardinal principle of statutory construction that repeals by implication are not favored."<sup>324</sup> "[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"<sup>325</sup> As noted above, there was no clearly expressed congressional intention, so § 1331 jurisdiction must apply unless the two statutes irreconcilably conflict.<sup>326</sup>

The TCPA and § 1331 do not conflict at all. By the plain text of 47 U.S.C. § 227(b)(3), state courts' jurisdiction over private TCPA actions is permissive, not exclusive.<sup>327</sup> Thus, concurrent federal jurisdiction conferred by 28 U.S.C. § 1331 does not conflict with the TCPA's grant of permissive state court jurisdiction.<sup>328</sup> Conflicts between statutes do not occur under these circumstances,<sup>329</sup> but rather when two statutes can be read to apply to the same situation and yield inconsistent results.<sup>330</sup>

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have exclusive jurisdiction . . . , or that state courts and federal courts have concurrent jurisdiction.").

321. See *supra* notes 113-15 and accompanying text.

322. See *supra* notes 244-52 and accompanying text. The Eleventh Circuit adopted this analysis. See *supra* note 253 and accompanying text.

323. The court probably did so because of its mistaken belief that the Tucker Act effected an implied partial repeal of § 1331. See *supra* note 249 and accompanying text. For a brief explanation of the Tucker Act and its relationship to § 1331, see *supra* notes 126-41 and accompanying text.

324. *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986); see also *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("It is well settled . . . that repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'" (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939))). For a discussion of implied repeals, see *supra* notes 116-22 and accompanying text.

325. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). *Ruckelshaus* involved a dispute over whether the jurisdiction conferred by the Tucker Act, see *supra* note 127 and accompanying text, had been partially repealed by certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. The Court concluded that no repeal of Tucker Act jurisdiction was intended, although it had to imply a requirement that remedies under FIFRA be exhausted before Tucker Act relief was sought to reconcile the two statutes. *Id.* at 1017-18.

326. See *Campbell v. Minneapolis Pub. Hous. Auth.*, 175 F.R.D. 531, 535 n.3 (D. Minn. 1997) ("Repeal by implication is disfavored unless the earlier and later statutes are irreconcilable.").

327. See *supra* note 320 and accompanying text.

328. See *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 914 (S.D. Ind. 1995).

329. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 547 (1972) (finding no conflict between the statute giving federal courts specific jurisdiction over § 1983 claims and the statute setting forth the minimum jurisdictional amount for federal courts, because the latter could be read to apply to only the general jurisdictional statutes).

330. For example, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), both the FIFRA and the Tucker Act arguably applied where an EPA regulation adversely af-

On the other hand, the Fourth and Fifth Circuits' readings of the TCPA's legislative history suggest a potential conflict with § 1331 because the circuits conclude that the legislative history evinces Congressional intent that state courts have exclusive jurisdiction over private TCPA actions.<sup>331</sup> The TCPA's legislative history, however, is sketchy and ambiguous.<sup>332</sup> Moreover, the circuit courts' interpretation of the TCPA's legislative history is inconsistent with the Supreme Court's interpretation of similar history in *Gulf Offshore Co. v. Mobil Oil Corp.*,<sup>333</sup> *Tafflin v. Levitt*,<sup>334</sup> and *Yellow Freight System, Inc. v. Donnelly*.<sup>335</sup>

The Fourth Circuit rejected the application of *Tafflin* because "a statute authoriz[ing] suit in state courts . . . through the use of the term 'may,' . . . cannot confer jurisdiction on a federal court because federal courts are competent to hear only those cases specifically authorized."<sup>336</sup> But *Gulf Offshore* and *Tafflin* do not hold that permissive language referring to federal jurisdiction *confers* state court jurisdiction.<sup>337</sup> Indeed, by emphasizing states' positions as sovereigns in our federal system, the cases implicitly reject the notion that Congress can confer any jurisdiction at all on state courts. Instead, the source of state court jurisdiction is each state's individual sovereignty, as recognized by our federal system.<sup>338</sup>

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fects Monsanto by releasing trade secrets into the marketplace. *Id.* at 1016-19. Under FIFRA, Monsanto could obtain an injunction to prevent the EPA action. *Id.* at 1017. Under the Tucker Act, Monsanto could only bring a suit for compensation after the action. *Id.* at 1016-19. FIFRA contains a provision providing that an entity that fails to submit to its procedures forfeits its right to compensation, and Monsanto argued that this indicated Congress's intent that there be no Tucker Act remedy. *Id.* at 1018. The Court, however, reconciled the conflicting statutes by requiring plaintiffs to exhaust administrative remedies under FIFRA before filing Tucker Act claims. *Id.* at 1018. For another conflict-and-reconciliation, see *Watt v. Alaska*, 451 U.S. 259, 267-73 (1981) (reconciling 1964 amendments to Wildlife Refuge Revenue Sharing Act and Mineral Leasing Act ("WRRSA") by restricting application of WRRSA to acquired refuge lands). For a case where two statutes in conflict could not be reconciled, see *Guam v. Quinata*, 704 F.2d 1085 (9th Cir. 1983) (holding that Guam Crim. and Corr. Code § 7.10 repealed Guam Civ. P. Code §§ 251-52 by implication).

331. See *supra* notes 232-39 and accompanying text.

332. Although Senator Hollings describes state courts' jurisdiction over private TCPA actions, nowhere in the legislative history of the TCPA is the jurisdiction of federal courts, or § 1331 explicitly discussed. See *supra* notes 178-217 and accompanying text. Moreover, Senator Hollings never refers to state court jurisdiction as "exclusive." See *supra* notes 204-06 and accompanying text.

333. 453 U.S. 473 (1981).

334. 493 U.S. 455 (1990).

335. 494 U.S. 820 (1990).

336. *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1151-52 (4th Cir. 1997).

337. See *supra* notes 80-97 and accompanying text.

338. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under [our federal] system of dual sovereignty, we have consistently held that state courts have *inherent* authority . . . to adjudicate claims arising under the laws of the United States." (emphasis added)); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) ("This rule [that state courts have jurisdiction over federal causes of action] is premised on the relation

The Fifth Circuit made a similar error, rejecting application of *Gulf Offshore* because "we are presented with the question of whether Congress intended to grant federal courts implied concurrent jurisdiction of federal claims that *it expressly granted state courts jurisdiction to adjudicate*."<sup>339</sup> As noted above, Congress does not "grant" state courts jurisdiction,<sup>340</sup> and did not do so in the TCPA.<sup>341</sup> The court conflated the definitional use of the language, by which Congress was merely defining the cause of action, and the jurisdictional use of the language, by which it confers jurisdiction.<sup>342</sup>

A proper reading of the *Gulf Offshore* cases is not that use of the permissive "may" regarding federal jurisdiction grants state courts jurisdiction, but that states have inherent jurisdiction over any federal claim created by use of such permissive language, unless it is unmistakably clear that Congress intended otherwise.<sup>343</sup> Thus, state courts have jurisdiction over federal actions by virtue of their status as courts of general jurisdiction of sovereigns in our federal system, unless Congress unmistakably divests them of jurisdiction.<sup>344</sup> Similarly, federal

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between the States and the National Government within our federal system. The two exercise concurrent sovereignty . . .").

339. *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997) (emphasis added).

340. One commentator, however, does speak of the power of Congress to grant state courts jurisdiction, even over state law claims. See Louise Weinberg, *The Power of Congress Over Courts in Nonfederal Cases*, 1995 BYU L. Rev. 731, 755 (1995) ("Arguably it is even possible to read the Due Process Clause of the Fourteenth Amendment as a source of national power to confer jurisdiction upon . . . state courts adjudicating nonfederal cases . . .").

341. Despite this error, the circuit courts were correct in noting that the presumption of jurisdiction enjoyed by state courts as courts of general jurisdiction, see *supra* notes 84, 106 and accompanying text, does not apply to federal courts, which must be explicitly granted jurisdiction, see *supra* note 298 and accompanying text. Section 1331, however, explicitly grants federal courts jurisdiction over federal claims, because such claims "arise under" federal law. See *supra* notes 42-59 and accompanying text.

342. Many uses of jurisdictional language have definitional meaning but little or no jurisdictional meaning. For example, language explicitly stating that a cause of action may be brought in federal or state court is almost purely definitional because jurisdiction is conferred to federal courts by 28 U.S.C. § 1331 and is inherent in state courts' general jurisdiction. See *supra* notes 68-70 and accompanying text. Even permissive language mentioning only federal courts is more definitional than jurisdictional, because it would have jurisdictional meaning only in the event that the general federal question jurisdiction statute was repealed. The language of the TCPA is purely definitional: Because Congress cannot "confer" jurisdiction on state courts, the language operates only to define the cause of action.

343. See *Tafflin v. Levitt*, 493 U.S. 455 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

344. See *supra* notes 106-08 and accompanying text. Because of the importance of state sovereignty in our federal system, a more stringent test than the one set forth in *Gulf Offshore* may be appropriate. See *Tafflin*, 493 U.S. at 472 (Scalia, J., concurring) (arguing that legislative history, even if unmistakably clear, should not defeat state court jurisdiction); see also Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383 (1991) (arguing that only a clear statement in the text is appropriate to defeat state court jurisdiction). It is the analysis of the legislative his-



courts have jurisdiction over federally created causes of action via 28 U.S.C. § 1331,<sup>345</sup> unless Congress clearly repeals that statute in whole or in part.<sup>346</sup> Thus, the *Gulf Offshore* cases are instructive for the proper use of legislative history to infer Congressional intent to withdraw pre-existing jurisdiction.<sup>347</sup> Viewed through the lens of the *Gulf Offshore* framework for analyzing legislative history, the history of a statute creating a federal cause of action, such as the TCPA, should not defeat § 1331 jurisdiction unless it is unmistakably clear that Congress intended otherwise.<sup>348</sup>

Far from being clear, the legislative history and its analysis by the circuit courts reveal the wisdom of Judge Leventhal's words.<sup>349</sup> The legislative history of the provision in question consists solely of Senator Hollings's remarks; both the Senate and the House had issued their reports before the bill was amended, and no one other than the Senator mentioned the provisions in debate.<sup>350</sup> Yet, on this thin reed the Fourth Circuit imputed congressional intent to partially repeal a law that has survived a century.<sup>351</sup>

A careful look at the Senator's remarks, however, reveals that not once did he mention the alleged exclusivity of state court jurisdiction.<sup>352</sup> There is no indication in his remarks that Congress even considered the question of concurrent jurisdiction.<sup>353</sup> The Supreme Court found similar history inconclusive in *Tafflin*,<sup>354</sup> and, contrary to the circuit courts' interpretation, it is inconclusive here.

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tory in the *Gulf Offshore* cases, however, that is instructive here. For detailed analyses of federalism and sovereignty, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. Rev. 835 (1995).

345. See *supra* notes 42-59 and accompanying text.

346. See *supra* note 113-16 and accompanying text (discussing explicit partial repeals of § 1331); *supra* notes 118-19 and accompanying text (discussing rule requiring "irreconcilable conflict" for repeal by implication).

347. For a proposal for a statute to guide courts' use of legislative history in interpreting jurisdictional statutes, see Bernard S. Meyer, *Some Thoughts on Statutory Interpretation with Special Emphasis on Jurisdiction*, 15 Hofstra L. Rev. 167 (1987).

348. Note that the test for finding an implied repeal of a statute and the test for finding an implied intent to restrict state court jurisdiction over a federal action are nearly identical. Compare *supra* note 119 and accompanying text (stating the rule that repeal of a statute by implication occurs only when there is an affirmative showing of an intention to repeal or if the statutes are irreconcilable), with *supra* note 89 and accompanying text (stating that the presumption of state court jurisdiction over a federal action can be rebutted by unmistakable implication in legislative history or clear incompatibility between state court jurisdiction and federal interests).

349. See *supra* note 1 and accompanying text.

350. See *supra* notes 204-17 and accompanying text.

351. See *supra* notes 33-37 and accompanying text (describing the history of the federal question jurisdiction statute).

352. See *supra* notes 204-06 and accompanying text.

353. See *supra* notes 204-06 and accompanying text.

354. See *supra* notes 91-97 and accompanying text.

A reading of the transcripts of the hearings mentioned by the Senator does not make Congress's intent any clearer.<sup>355</sup> Multiple witnesses advocated adding enforcement provisions into the bill.<sup>356</sup> Some expressed skepticism about FCC enforcement.<sup>357</sup> Some witnesses mentioned the relatively low dollar amounts at issue in private actions.<sup>358</sup> None of them, however, spoke about jurisdiction.<sup>359</sup>

At most, the Senator's remarks and the hearing transcripts taken together reveal an assumption among many participants that the private actions would be brought in state small claims court. This does not, however, constitute affirmative evidence that Congress intended that jurisdiction over private TCPA actions be exclusive to state courts. *Yellow Freight*<sup>360</sup> teaches that even a universally shared expectation that claims would be brought in one court cannot be an adequate substitute for a legislative decision to defeat jurisdiction in another court.<sup>361</sup> Thus, the assumption that private TCPA actions would be brought in state small claims courts cannot be an adequate substitute for a legislative decision to partially repeal 28 U.S.C. § 1331.

Other parts of the circuit courts' analyses also wither under sustained scrutiny. For example, the significance of explicit grants of concurrent jurisdiction in some parts of the Communications Act<sup>362</sup> is considerably undermined by ambiguous grants of jurisdiction in other parts of the Act.<sup>363</sup> Moreover, there is a split among state courts over whether the provision of the Communications Act which permits private actions for injuries resulting from violations of the Act<sup>364</sup> in "either" the FCC or a federal district court,<sup>365</sup> ousts state courts from

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355. See *supra* notes 190-203 and accompanying text.

356. See *supra* notes 190-203 and accompanying text.

357. See *supra* notes 196-97 and accompanying text. Senator Hollings explicitly mentioned these concerns on the Senate floor. See *supra* note 205 and accompanying text.

358. See *supra* note 198 and accompanying text. One proposal included attorney's fees, presumably to encourage enforcement. See *supra* note 201 and accompanying text.

359. See *supra* notes 190-203 and accompanying text.

360. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990).

361. See *supra* notes 98-105 and accompanying text.

362. See *supra* note 235 and accompanying text.

363. See 47 U.S.C. § 401(b) (1994) (action for injunction "may" be brought in federal district court); *id.* § 406 ("[federal] district courts . . . shall have jurisdiction"); *id.* § 532(d) (party "may" bring action in federal district court); *id.* § 551(f) (same).

364. 47 U.S.C. § 207 (1994).

365. The Fifth Circuit listed § 207 among provisions of the Communications Act explicitly granting *concurrent* jurisdiction to federal and state courts. See *supra* note 235 and accompanying text. This was an error.

jurisdiction over such actions.<sup>366</sup> Thus, Congress may have explicitly mentioned state courts to avoid confusion with § 207.<sup>367</sup>

The significance of the TCPA's grant of exclusive federal jurisdiction over cases brought by states<sup>368</sup> is also questionable.<sup>369</sup> The *Kenro* court found that the language granting exclusive federal jurisdiction over state claims "has no bearing whatsoever" on the jurisdiction of the TCPA's private claims.<sup>370</sup> Moreover, the provision for exclusive federal jurisdiction of state claims supports two contradictory inferences. On the one hand, a grant of exclusive jurisdiction may be evidence that Congress considered the effects of concurrent jurisdiction. On the other hand, use of the word "exclusive" in the state action provision and its omission in the private action provision may suggest a conscious choice of concurrent jurisdiction. The circuit courts presented no justification for preferring the former inference over the latter.<sup>371</sup>

In addition, the circuit courts' reliance on cases involving implied rights of action is misplaced.<sup>372</sup> Although it is true that courts should not provide remedies that Congress did not intend,<sup>373</sup> Congress did provide a private remedy in the TCPA, which would be identical in federal or state court.<sup>374</sup> Similarly, the Fifth Circuit's concern that permitting federal jurisdiction would strip the language mentioning state courts in the TCPA of its meaning is unfounded.<sup>375</sup> The language would continue to have jurisdictional meaning because it prevents confusion between the TCPA and other provisions of the Communications Act.<sup>376</sup> It would also have definitional meaning as part of the clause creating the private right of action.<sup>377</sup>

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366. Compare *Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp.*, 338 N.Y.S.2d 31, 34-35 (N.Y. Sup. Ct. 1972) (holding that federal district courts have exclusive jurisdiction over § 207 claims) with *US Sprint Communications Co. v. Computer Generation, Inc.*, 401 S.E.2d 573, 575 (Ga. Ct. App. 1991) (holding that states have concurrent jurisdiction over § 207 claims).

367. Interestingly, database searches reveal no state court opinions on cases filed under provisions of the Communications Act granting permissive federal court jurisdiction. See *supra* note 363 and accompanying text (listing relevant statutes). Thus, although state courts presumably have jurisdiction per the *Gulf Offshore* cases, see *supra* notes 77-106 and accompanying text, it is possible, given the text of § 207, that state courts do not have jurisdiction over Communications Act claims unless Congress specifies concurrent jurisdiction over a particular cause of action.

368. See 47 U.S.C. § 227(f) (1994).

369. See *supra* notes 233-39 and accompanying text.

370. *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 914 (S.D. Ind. 1995).

371. See *supra* notes 233-34 and accompanying text.

372. See *supra* notes 240-43 and accompanying text.

373. See *supra* note 243 and accompanying text.

374. See 47 U.S.C. § 227(b)(3).

375. See *supra* notes 259-62 and accompanying text.

376. See *supra* notes 364-67 and accompanying text.

377. See *supra* notes 109-12 and accompanying text (discussing the distinction between jurisdictional meaning and the definitional meaning of jurisdictional language that creates a cause of action).

Finally, contrary to the Fourth Circuit's analysis, the Tenth Amendment would pose no bar to a congressional mandate that state courts enforce a federally created right.<sup>378</sup> Since *Testa v. Katt*,<sup>379</sup> it has been clear that states cannot arbitrarily refuse to enforce federal law.<sup>380</sup> Thus it cannot be true, as the Fourth Circuit suggests, that the inclusion of the provision permitting states to opt out of permitting TCPA actions is further evidence that state jurisdiction was to be exclusive.<sup>381</sup> At best, it is meaningless. At worst, it would place the statute in violation of the Fifth Amendment without federal court jurisdiction ensuring at least one forum for all citizens.<sup>382</sup>

### CONCLUSION

Title 28, section 1331 of the U.S. Code is worthy of the same respect accorded any federal statute. Although the Supreme Court has never announced a clear test to determine if a case "arises under" federal law for the purposes of § 1331, it has been clear for 82 years that a federal cause of action will support § 1331 jurisdiction. Any statute that removes a federal cause of action from the jurisdiction of federal district courts partially repeals § 1331. If such a statute does not explicitly mention § 1331, it repeals § 1331 by implication.

Repeals by implication are appropriate only when congressional intent to repeal is clear or two statutes are irreconcilable. There is no reason that this rule should have less force for § 1331. Courts should not be free, therefore, to find clear intent to repeal § 1331 jurisdiction by attending the cocktail party of legislative history and spotting a few "friends." Instead, there must be explicit mention of "exclusive" jurisdiction in courts other than the federal district courts or explicit mention of the inapplicability of § 1331 to the cause of action being created.

The TCPA's legislative history contains neither an explicit mention of "exclusive" state court jurisdiction nor a mention of § 1331. In addition, the TCPA's language permitting private actions in state courts does not conflict with § 1331's grant of jurisdiction over cases "arising under" federal law to federal district courts. Thus, the Fourth, Fifth,

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378. See *supra* notes 273-76 and accompanying text (providing Fourth Circuit's analysis).

379. 330 U.S. 386 (1947).

380. See *Testa*, 330 U.S. at 393-94; see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1022-30 (1995) (asserting that Congress is constitutionally permitted to require state courts to recognize federal claims). Indeed, the Madisonian Compromise giving Congress discretion to create lower federal courts would be meaningless if Congress lacked this power. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1153-54 (1988) (discussing the Madisonian Compromise).

381. See *supra* note 276 and accompanying text.

382. It is likely, however, that the statute would pass rational basis scrutiny. See *supra* notes 271-72 and accompanying text.

and Eleventh Circuits erred in holding that jurisdiction over private TCPA actions is exclusive to state courts. Federal district courts have jurisdiction of private TCPA actions through § 1331's grant of general federal question jurisdiction.

## *Notes & Observations*